TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 220 44.

MILTON C. CONNERS, JR., ADMINISTRATOR OF MILTON C. CONNERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE NORTHERN CHEYENNE INDIANS ET AL.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 29, 1899.

(17,388.)

(17,388.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 279.

MILTON C. CONNERS, JR., ADMINISTRATOR OF MILTON C. CONNERS, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE NORTHERN CHEYENNE INDIANS ET AL.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1900.

1 In the Court of Claims.

MILTON C. CONNERS, JR., Administrator of Milton C. Conners, Deceased, *vs.* THE UNITED STATES and THE NORTHERN Cheyenne Indians, The Northern Band of Northern Cheyenne Indians, The Southern Band of Northern Cheyenne Indians, Dull Knife's Band of Northern Cheyenne Indians, Little Wolf's Band of Northern Cheyenne Indians, The (Southern) Cheyenne and Arapahoe Indians.	No. 1077. Indian Depredation.

I.—*Amended Petition. Filed January* 26, 1898.

(Original petition filed April 27, 1891.)

To the honorable the Court of Claims:

The claimant, Milton C. Conners, Jr., respectfully represents:

I. That he is a citizen of the United States and a resident of Powderville, Montana, and administrator of the estate of Milton C. Conners, deceased.

II. That the following property belonging to decedent, who was at that date a citizen of the United States, was taken or destroyed by Indians of a tribe or nation then in amity with the United States, and who were chargeable for said depredation by reason of a treaty between said Indians and the United States, the date, place, and tribe being particularly stated below:

On the Republican river, in Nebraska, on or about the 3rd day of October, 1878, by Northern Cheyenne Indians, the Northern band of Northern Cheyenne Indians, the Southern band of Northern Cheyenne Indians, Dull Knife's band of Northern Cheyenne Indians, Little Wolf's band of Northern Cheyenne Indians, the
2 (Southern) Cheyenne and Arapahoe Indians.

4 horses at $100 each	$4,500.00
2 mules at $200 each	400.00
33 beef steers at $30 each	1,500.00
	$6,490.00
Deduct 1 mule recovered	175.00
	$6,315.00

III. That a claim for said property, with evidence therein, was presented to the Commissioner of Indian Affairs, the items of said claim being as heretofore stated.

That the following action was taken thereon: Reported by Interior Department to Congress January 13, 1891. Disallowed.

IV. That no other action than as aforesaid has been had on this claim in Congress or by any of the departments; that the claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that the claimant is a citizen of the United States, and the claimant believes the facts as stated in this petition to be true.

And the claimant prays judgment upon the facts and the law in the sum of six thousand three hundred and fifteen dollars ($6,315).

WILLIAM B. KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am the attorney for the claimant in this case. I have read above petition, and the matters therein stated are true to the best of my knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 24th day of January, 1898.

S. A. TERRY,
Notary Public.

[SEAL.]

3 II.—*Defendants' Plea.*

Filed January 17, 1898.

MILTON C. CONNERS
vs.
THE UNITED STATES and DULL KNIFE'S BAND OF Northern Cheyennes and The Northern Cheyenne Indians. } No. 1077.

Come defendants, by the Assistant Attorney General, and for plea to the amended petition filed in the above-styled cause say that the claimant should not have and maintain his aforesaid action against them, because they say that the depredation was committed by Dull Knife's band of Northern Cheyenne Indians, as alleged in the said amended petition, which said band was an independent band at the time of the commission of said depredation, and was not on said date in amity with the United States.

And this they are ready to verify.

JOHN G. THOMPSON,
Assistant Attorney General.

HARRY PEYTON, *Ass't Att'y.*

4 In the Court of Claims, Term 1898–'9.

MILTON C. CONNERS, JUNIOR, Administrator of Milton C. Conners, Deceased,
vs.
THE UNITED STATES ET AL. } No. 1077. Ind. Dep.

III.—*Claimant's Replication to Defendants' Plea.*

Filed April 19, 1899.

The claimant, for replication to defendants' plea, says that Dull Knife's band named in said plea did not constitute, as averred in the plea, "an independent band at the time of the commission of the said depredation."

And the claimant further avers that the Indians who committed the depredation complained of were members of a band, tribe, or nation then in amity with the United States; and this claimant is ready to verify.

Wherefore claimant prays judgment, and that the defendants answer over.

WILLIAM B. KING,
Attorney for Claimant.

5 IV.—*Findings of Fact, Conclusions of Law, and Opinion. Filed by the Court March* 21, 1898.

Findings of fact.

I.

At the time of the depredation hereinafter found the claimant was a citizen of the United States, residing in the State of Nebraska. The depredation was committed without cause or provocation on the part of the claimant or his agent in charge and the property has never been returned or paid for.

II.

The depredation was committed on the 1st of October, 1878, by Northern Cheyenne Indians, more particularly described hereafter. The property taken and destroyed consisted of 40 horses, 1 mule, and 40 steers, of the value in the aggregate of $3,750.

III.

In May, 1877, 937 Northern Cheyennes, men, women, and children, were removed from the Red Cloud reservation at Fort Robinson in Nebraska to the Southern Cheyenne and Arapahoe reservation at Fort Reno, in the Indian Territory. The Cheyennes went voluntarily, though reluctantly, relying in part upon representations made to them that the southern reservation would be a desirable home, and in part upon what they understood to be assurances, that

if dissatisfied with it they should be brought back. The body of Indians was composed of subdivisions of the Cheyenne tribe known as the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow. These so-called bands had no autonomy, and had not been recognized either by the Government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders or spokesmen, commonly called head men. The Indians so removed were about one-half of the entire tribe.

On the reservation at Fort Reno, the Cheyennes of Dull Knife's and Little Wolf's bands lived apart from other Indians on the reservation. They were dissatisfied and made repeated applications tothe Government to be brought back to what they termed their native country in the Northwest. No notice being taken of their request, 320 of them broke away from the reservation on September 9, 1878. The commanding officer at Fort Reno sent a military force in pursuit. "The officer in command was particularly instructed if he could induce the Indians to come back without resort to force to do so."

The Cheyennes were overtaken at a point 120 miles distant from Fort Reno. The officer in command summoned them to yield and return to the reservation. Little Wolf, as spokesman for the Cheyennes, replied in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon the Cheyennes, who returned the fire, and then fled and escaped. They made their way across Kansas and Nebraska, twice fighting United States troops and likewise a body of armed citizens who attacked them. In the northern part of Nebraska they were intercepted by other troops, and after some fighting they surrendered on the 3d of October and were taken to Fort Robinson. Shortly before this surrender, Little Wolf with about half of the party had separated from Dull Knife, and he and his party were not included in the surrender. Old Crow and Wild Hog, with some of their bands, accompanied Dull Knife's party in this escape from the Indian Territory. The leading chief was Dull Knife, and the Indians, regarded as a military force, were under his command. The band at the time of the surrender consisted of 49 men, 51 women, and 48 children.

Up to the time these Cheyennes were fired upon in the Indian Territory by the pursuing troops they had committed no atrocity and were in amity with the United States and desired to remain so. After they were fired upon, as before described, their flight was characterized by the usual characteristics of Indian warfare. During the period of this flight—that is to say, between the 9th
6 of September and the 3d of October, 1878—the Northern Cheyennes, both in the Indian Territory and on the northern reservations, were in amity with the United States.

On these specific facts the court finds the ultimate facts, that at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United

States, with the exception of these who composed the bands of Dull Knife and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as conclusions of law:

The bands of Dull Knife and Little Wolf, at the time when the depredation was committed, were independent bands of Indians within the intent and meaning of the Indian depredation act, 1891; and the tribe of Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed.

Opinion.

NOTT, *Ch. J.*, delivered the opinion of the court:

In May, 1877, the Northern Cheyennes numbered about 1,800 persons. They had borne a distinguished part in the Sioux war of 1876, but had surrendered and made peace with the United States, and were then indeed acting as scouts and soldiers for the Government. In that month 937 were taken to the Indian Territory. The body was said to be composed of Dull Knife's band, of Wild Hog's, of Old Crow's, and of Little Wolf's. The so-called bands were not then bands in a tribal, political, or military sense, but simply parties who lived, as it were, in separate hamlets on the reservation; and the so-called chiefs were without authority, chiefs who could not make war or conclude peace or enter into treaty stipulations, but simply head men, leaders, or spokesmen.

During the previous autumn all of the Northern Cheyennes who had been in arms with Sitting Bull had come in and surrendered except Dull Knife's band.

On the 25th of November, 1876, Colonel Mackenzie had struck the village of Dull Knife with a column led by Indian scouts, many of whom were Cheyennes. The Indians were surprised, and fled among the rocks with nothing but their arms and ammunition and the clothes they wore. The weather was so intensely cold that on the nights of the 25th and 26th fourteen Indian babies were frozen to death in their mothers' arms. Dull Knife and his band made their way to the camp of Crazy Horse, who received them so coldly that they were deeply incensed, and came in and surrendered and turned against Crazy Horse and the remnant of the Ogalallas who were still hostile. During the ensuing winter friendly relations were cultivated by the officers who had fought them. Captain Bourke writes:

One day when the Cheyenne chief Dull Knife was at headquarters, I invited him to stay for luncheon.

"I should be glad to do so," he replied, "but my daughters are with me."

"Bring them in, too," was the reply from others of the mess, and Spotted Tail, who was present, seconded our solicitations; so we

had the pleasure of the company, not only of old Dull Knife, whose life had been one of such bitterness and sorrow, but of his three daughters as well. They were fairly good-looking—the Cheyennes will compare favorably in appearance with any people I have seen—and were quite young; one of nine or ten, one of twelve, and the oldest not yet twenty—a young widow.

Of the other Cheyennes, there was Little Wolf, one of the bravest in fights where all were brave.

This was the condition of Dull Knife's band when the removal to the Indian Territory took place. It had been on the warpath, acting independently of the other members of the tribe, but at the time was merged in the mass of Northern Cheyennes on the reservation, and was with all the others there in amity.

After a year of sickness, misery, and bitterness in the Indian Territory, and repeated prayers to be taken back to the country where their children could live, 320 of them, in September, 1878, broke away from the reservation. Dull Knife and Little Wolf were the leaders of this escaping party, which consisted of their bands.

They were pursued and overtaken. A parley ensued in which Little Wolf, whom Captain Bourke characterizes as "one of the bravest in fights where all were brave," said, "We do not want to fight you, but we will not go back." The troops instantly fired upon the Cheyennes and a new Indian war began.

That volley was one of the many mistakes, military and civil, which have been the fatality of our Indian administration, for the officer who ordered it thereby instituted an Indian war, and
7 at the same instant turned hostile savages loose upon the unprotected homes of the frontier and their unwarned, unsuspecting inmates. The Cheyennes outgeneraled the troops. They fought and fled, and scattered and reunited; they fought other military commands and citizens who had organized to oppose them, and in like manner they again and again eluded their opponents, making their way northward over innumerable hindrances. They had not sought war, but from the moment when they were fired upon they were upon the warpath—men were killed, women were ravished, houses were burned, crops destroyed. The country through which they fled and fought was desolated, and they left behind them the usual well-known trail of fire and blood.

At length, on the 3d of October, 1878, in northern Nebraska, the Cheyennes were brought to bay by troops who intercepted and fought them. They surrendered and were carried as prisoners of war to Fort Robinson, numbering then 49 men, 51 women, and 48 children. The war had ended, but the Cheyennes were able to console themselves with the reflection that the officer who began the war had not been able to carry them back to the reservation; that they had killed Lieutenant-Colonel Lewis, 5 soldiers, and 26 settlers, and that the wives and children of their enemies had suffered more bitterly than their own.

But here a new element comes into the case. Shortly before or after the depredations were committed which are the subject of the present action, but before the final capture of the Indians above re-

ferred to, Little Wolf and his band separated from the others and turned into the mountains. They disappeared then and as a band have never been seen since. Whether they perished during the ensuing winter or made their way northward and merged with other Indians is conjectured. Only thirty are known to have reached the Cheyenne reservation on the Rosebud. Dull Knife and his band were carried to Fort Robinson. There they persistently refused to return to the reservation and were kept in close custody. In January, 1879, orders from the Interior Department arrived at Fort Robinson peremptorily directing the commanding officer to remove them to the reservation. On the 3d of January, 1879, the Indians were told of this, and on the next day gave, through Wild Hog, their spokesman, their unequivocal answer, "We will die, but we will not go back."

The commanding officer apparently shrunk from shooting them down; removing them meant nothing short of that, or of actually carrying each one forcibly to the detested place from which they had escaped. The military authorities therefore resorted to the means for subduing the Cheyennes by which a former generation of animal tamers subdued wild beasts. In the midst of the dreadful winter, with the thermometer 40° below zero, the Indians, including the women and children, were kept for five days and nights without food or fuel, and for three days without water. At the end of that time they broke out of the barracks in which they were confined and rushed forth into the night. The troops pursued, firing upon them as upon enemies in war; those who escaped the sword perished in the storm. Twelve days later the pursuing cavalry came upon the remnant of the band in a ravine 50 miles from Fort Robinson. "The troops encircled the Indians, leaving no possible avenue of escape." The Indians fired on them, killing a lieutenant and two privates. The troops advanced; "the Indians, then without ammunition, rushed in desperation toward the troops with their hunting knives in hand; but before they had advanced many paces a volley was discharged by the troops and all was over." "The bodies of 24 Indians were found in the ravine—17 bucks, 5 squaws, and 2 papooses." Nine prisoners were taken—1 wounded man and 8 women, 5 of whom were wounded. The officer in command unconsciously wrote the epitaph of the slain in his dispatch announcing the result: "The Cheyennes fought with extraordinary courage and firmness, and refused all terms but death." The final result of the last Cheyenne war was, that of the 320 who broke away in September, 7 wounded Cheyennes were sent back to the reservation.

This statement illustrates the extraordinary difficulties which the court has had to encounter in dealing with these Indian depredation cases. The United States are liable only as guarantors where the Indians are known, and there must primarily be a judgment against such Indian defendants which the United States undertake to pay if it cannot be collected from the Indian judgment debtors. In this case, if these bands of Dull Knife and Little Wolf are to be regarded as responsible entities and as the proper Indian defendants

against whom a judgment should be rendered, and this were an ordinary suit at law, there would really be no defendant before the court, for these bands had utterly ceased to exist before the suit was brought.

These Indians, indeed, in 1878, occupied an anomalous position unknown to the common or the civil law, or to any system of municipal law. They were neither citizens nor aliens; they were neither free persons nor slaves; they were the wards of the
8 nation, and yet, on a reservation under a military guard, were little else than prisoners of war while war did not exist. Dull Knife, and his daughters, could be invited guests at the table of officers and gentlemen, behaving with dignity and propriety, and yet could be confined for life on a reservation which was to them little better than a dungeon on the mere order of an executive officer.

It has been argued in this case with great earnestness that these Cheyennes had a lawful right to leave the reservation and travel peaceably back to their old homes; that they did not begin the conflict and merely resisted force by force; that their acts were lawful and the action of the pursuing troops unlawful. But it is impossible to define their status from a legal point of view. Whether they could have sued out writs of *habeas corpus* and been set free by judicial authority it is not for this court now to decide. For the purposes of the jurisdictional statute it is enough to say that after they were first fired upon they were not in amity. If their action was lawful and the acts of the military were unlawful, those circumstances make the cause of war more justifiable and pronounced.

It has also been urged that certain appropriations made by Congress granting relief to some of the victims of these depredations committed by Dull Knife's band, and directing that the payments be charged to and deducted from moneys which might otherwise be paid to the "Northern Cheyenne and Arapahoe Indians," is a legislative recognition of the then existing unity of the Northern Cheyenne tribe and of Dull Knife's band as individuals of the tribe. But Congress have, by the subsequent jurisdictional act, authorized the Northern Cheyennes to come into this court and have their rights and liabilities judicially determined. A primary question in their case is whether they were legally responsible for the acts of certain hostile Indians. That question is a judicial question, and consequently one which the court must decide irrespective of legislative action. The recognition of bands and tribes by the political branches of the Government must be contemporaneous. The legislative action above referred to was *ex post facto*. *Acts 17th of May*, 1882, and *4th July*, 1884 (22 Stat. L., p. 86; 23 *id.*, 95). Congress, with such light upon the case as then existed, endeavored to do justice in the premises; but the subsequent statute, the jurisdictional act, has transferred that duty to the judiciary.

The court regards these two bands as having been Indian entities and proper defendants in these cases within the intent of the decisions in *Montoya v. The Mescalero Apaches* (32 C. Cls. R., 249) and *Herring v. The Ute Indians* (*ib.*, 536). The bands of Little Wolf and

Dull Knife were not so large, and the objects for which they existed were not so well defined as those of Victoria and Black Hawk, but nevertheless were operating as independent bodies, distinct from and irrespective of all other Indians. Moreover, their acts were acts of war. It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was the case of an entire body waging armed resistance with all its might and with all the ferocity of Indian warfare against whatever power the United States could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war refutes the idea of a pre-existing condition of amity and renders it preposterous.

In 1878 the Northern Cheyennes no longer existed as an entire body or as a responsible tribe. Half of them had been carried south to the Indian Territory and half westward to the headwaters of the Rosebud, and these two bands, headed by Little Wolf and Dull Knife, after they broke away from the reservation, belonged to neither half. The Cheyennes who remained in the Indian Territory could exercise no control over them; the Cheyennes on the Rosebud had been permanently separated from them. To hold these warring elements of an Indian band, which were then isolated and in active hostility, as nothing more than a number of individual Indians not at war but engaged in personal plunder while their tribe remained at peace would be to defeat the purpose of all and each of the Indian indemnity acts. It is indeed most unfortunate that the unhappy frontiersman must suffer without remedy where the atrocities were greatest, while others can recover in other cases where the wrong done them was less; but nevertheless it must be held that if officers or agents or citizens of the United States drive a tribe or band of Indians into a state of war the tribe or band cannot be held liable for the obligations which would rest upon them if they were enjoying the blessings of peace and remaining in amity with the United States; and it must likewise be held that where the United States engage in war with a distinct portion of a tribe, acting independently of the tribe, over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity cannot be held responsible for the acts of the hostile Indians.

The judgment of the court is that the petition against the United States and the Cheyenne tribe be dismissed; and that the petition against the United States and Dull Knife's band and Little Wolf's band be dismissed for want of jurisdiction.

9 V.—*Claimant's Motion for New Trial.*

Filed April 2, 1898.

MILTON C. CONNERS, Adm'r of Milton C. Conners,
vs.
THE UNITED STATES and THE NORTHERN Cheyenne Indians.
} No. 1077. Ind. Dep.

Comes the claimant, by his attorney, and moves the court for a new trial of this cause upon the following assignments of error:

I. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow, by members of which the depredation in this case was committed, were bands within the meaning of the act of March 3, 1891.

II. The court erred in its finding that, though the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow had no autonomy and had not been recognized either by the Government or by the tribe as separate entities and were but "natural segregations of civilized Indians," they constituted a band or bands within the meaning of the act of March 3, 1891, having the capacity for hostility.

III. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow were at the time the depredation was committed "independent bands of Indians within the meaning of the Indian depredation act of 1891."

IV. The court erred in its finding that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow were hostile to the United States at the date of the depredation alleged.

10 V. The court erred in its finding that the Northern Cheyenne tribe of Indians, whose members committed this depredation, and which the court declared to have been in amity with the United States at the date thereof, is not responsible for the depredations committed by the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow, and is not liable to answer the claimant in this demand.

Wherefore the court is asked to grant a new trial in this case.

WILLIAM B. KING,
Attorney for Claimant.

11 VI.—*Stipulation.*

Filed April 24, 1899.

In the Court of Claims.

MILTON C. CONNERS, JR., Adm'r of Milton C. Conners, Deceased,
vs.
THE UNITED STATES ET AL.
} No. 1077. Ind. Dep.

It is hereby stipulated and agreed, for the purpose of preventing any question as to the right of appeal in this case, that the judgment

against the claimant on the 21st day of March, 1898, dismissing the petition may be set aside upon the motion for new trial already filed by the claimant in due time, and that a new judgment, precisely like the present judgment, may be entered against the claimant of the same date as the order setting aside the present judgment, and from this an appeal is to be taken to the Supreme Court.

WM. B. KING,
Attorney for Claimant.
JOHN G. THOMPSON,
Assistant Attorney General.

12 VII.—*Judgment of the Court and Allowance of Appeal.*

MILTON C. CONNERS, JUNIOR, Administrator,
vs.
THE UNITED STATES ET AL. } No. 1077. Indian Depredation.

At a Court of Claims held in the city of Washington on the 24th day of April, 1899, judgment was ordered to be entered up as follows:

By stipulation of the parties, the judgment rendered herein on the 21st day of March, 1898, is hereby set aside, and it is ordered that the petition against the United States and the Cheyenne tribe of Indians be dismissed, and that the petition as to the United States and Dull Knife's band and Little Wolf's band be dismissed for want of jurisdiction.

And upon application this day filed, made in open court, an appeal by the claimant to the Supreme Court of the United States from this judgment is allowed.

BY THE COURT.

13 In the Court of Claims.

MILTON C. CONNERS, JR., Administrator of Milton C. Conners, Deceased,
vs.
THE UNITED STATES and THE NORTHERN Cheyenne Indians, The Northern Band of Northern Cheyenne Indians, The Southern Band of Northern Cheyenne Indians, Dull Knife's Band of Northern Cheyenne Indians, Little Wolf's Band of Northern Cheyenne Indians, The (Southern) Cheyenne and Arapahoe Indians. } No. 1077. Ind. Dep.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 28 day of April, A. D. 1899.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,388. Court of Claims. Term No., 279. Milton C. Conners, Jr., administrator of Milton C. Conners, deceased, appellant, *vs.* The United States and The Northern Cheyenne Indians *et al.* Filed April 29th, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

MILTON C. CONNERS, JR. Administrator of MILTON C. CONNERS, deceased, *Appellant*, *v.* THE UNITED STATES *et al.*	No. 279. Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF CASE, ASSIGNMENT OF ERROR AND ARGUMENT.

The questions involved in this case are very similar to those in the case of Montoya *v.* United States and the Mescalero Apache Indians, No. 278, immediately preceding this case on the calendar, on appeal from the Court of Claims.

Copies of the brief in that case are therefore filed in this, and this brief will be devoted only to distinguishing between the conditions in the two cases, and to continuing the discussion in the light of those distinctions.

STATEMENT OF CASE.

This is an appeal from a judgment of the Court of Claims adverse to the claimant (33 Ct. Cls. 317) in a case arising under the Indian Depredation Claims Act of March 3, 1891 (1 Supp. R. S. 913; 26 Stat. L. 851).

This act provides that—

"The Court of Claims shall have and possess jurisdic-

tion and authority to inquire into and finally adjudicate * * * all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for."

The court has found that the depredation was committed by Northern Cheyenne Indians on October 1, 1878 (Rec. 3), and by a body of the tribe composed of the bands of Dull Knife and Little Wolf (Rec. 5).

In May, 1877, the Northern Cheyenne Indians numbered about 1800; 937 of these were then removed from the Red Cloud Reservation in Northwestern Nebraska to the Indian Territory. These comprised four subdivisions, known as the bands of Dull Knife, Little Wolf, Wild Hog and Old Crow.

Dull Knife's and Little Wolf's bands remained apart, dissatisfied, and made repeated applications to be taken back to their native country. No notice was taken of their request, and on September 9, 1878, 320 left the reservation, chiefly of Dull Knife's and Little Wolf's bands, but including some from Old Crow's and Wild Hog's bands. They travelled northward, and troops went in pursuit, the officer in command being particularly instructed to induce the Indians to come back without resort to force, if possible (Rec. 4). The Indians refused a summons to surrender, saying that they did not wish to make war, but would rather die than go back. The troops fired; the Indians returned the fire and then fled. They made their way across Kansas and Nebraska, fighting troops and citizens as they went, killing twenty-six settlers and taking or destroying much property, until a portion of them under Dull Knife surrendered on October 3, in Northern Nebraska. These comprised 148 Indians.

Little Wolf with about half of the party had separated from Dull Knife, either just before or just after this depredation and his party never surrendered, probably reaching their old home.

"Up to the time these Indians were fired upon in the Indian Territory by the pursuing troops, they had committed no atrocities, but were in amity with the United States, and desired to remain so. * * * During the period of this flight, that is to say, between the 9th of September and the 3d of October, 1878—the Northern Cheyennes, both in the Indian Territory and on the northern reservations, were in amity with the United States." (Rec. 4.)

As to the constitution of these so-called bands, the court says in its findings (Rec. 4):

"These so-called bands had no autonomy, and had not been recognized either by the Government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders or spokesmen, commonly called head men."

And in the opinion it is said (Rec. 5):

"The so-called bands were not then bands in a tribal, political, or military sense, but simply parties who lived, as it were in separate hamlets on the reservation; and the so-called chiefs were without authority, chiefs who could not make war or conclude peace or enter into treaty stipulations, but simple head men, leaders, spokesmen."

These conclusions of fact are found (Rec. 4):

"That at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United States, with the exception of these who composed the bands of Dull Knife

and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity."

And as conclusions of law the court says:

"The bands of Dull Knife and Little Wolf, at the time when the depredation was committed, were independent bands of Indians within the intent and meaning of the Indian depredation act, 1891; and the tribe of Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed."

ASSIGNMENT OF ERROR.

The claimant avers that the court erred in finding that the bands of Dull Knife and Little Wolf were independent bands within the meaning of the jurisdictional act; in finding that the band, tribe or nation to which the Indians committing the depredation belonged were hostile; and in dismissing the petition against the defendant, the Northern Cheyenne tribe, on account of the finding of hostility on the part of said bands.

ARGUMENT.

The question involved in this case, as in the Montoya case, is the definition of the word "band." The position was there taken that the previous use of the word in statute and treaty, its collocation in the act of March 3, 1891, and the logical inferences from other parts of that act required the word "band" to be read with the same meaning of nationality as the words "tribe" and "nation." It is not necessary to repeat the arguments of that brief of which copies are filed in this case.

The facts distinguishing this case and that of Montoya are that in the former case the so-called band was an aggregation of outlaws from various tribes temporarily as-

sociated. In the present case the so-called band was a village community without fixed residence living together under a headman, but without authority to make war, conclude peace or enter into treaty stipulations.

The Court of Claims held (Rec. 9) that this band had no separate existence while at peace on the reservation, but that in separating itself from the others of the tribe and assuming an attitude of armed opposition to the United States, it thereby became an independent organization, capable of waging war, entitled to belligerent rights, and in possession of treaty powers. To this the claimant answers:

(1) That the bands of Dull Knife and Little Wolf possessed no sovereignty permitting them to assume a status of hostility and assert belligerent rights;

(2) That a band, tribe or nation within the meaning of the act of 1891 can not come into complete existence by a number of Indians assuming a separate attitude of defiance of governmental authority, and

(3) That to consider such a division of a tribe as a separate "band," alone responsible for its depredations, it is to take away from the act of 1891 the entire idea of tribal responsibility which is one of its most prominent features.

We shall point out also that legislation of Congress has already fixed the responsibility for these depredations.

These Bands Without National Status.

In the brief in the Montoya case we discussed the elements of national existence. None of these can be found here. Dull Knife's band had no fixed territory, not subject to occupation by the other Northern Cheyenne Indians. Those who belonged to his band could leave him without any permission and attach themselves to some

other leader. This appears from the finding of the court that Old Crow and Wild Hog, the leaders of the two bands which remained on the reservation, left their own bands and, temporarily or permanently, attached themselves to those of Dull Knife and Little Wolf. The members of any band were none the less members of the Northern Cheyenne tribe in being of a particular band. Their allegiance is to the tribe. That is the political organization; the so-called band is a wandering village community without "tribal, political or military" existence.

In our discussion in the Montoya case, we have seen that the very reason for the freedom of a tribe from liability when the tribe is hostile is the recognition of belligerent rights in a dependent, domestic nation. Where the aspect of nationality is absent, acts of violence are not war, but crime. Belligerent rights only accrue to a nation having a right to make war.

Nationality Not Created by a Minority's Law-Breaking.

The opinion of the Court of Claims, we have seen, does not treat the bands of Dull Knife and Little Wolf as separate bands until their acts of revolt. If they committed depredations before the revolt, according to the court's theory, the tribal liability would be by the Northern Cheyenne Tribe, not by Dull Knife's or Little Wolf's band. The revolting Indians were not a majority of their tribe or even of those who had been removed to the Indian Territory. When a minority of these Indians united in armed resistance to the authority of the United States, although the tribe did not approve their act, they became, the court avers, of sufficient national capacity to gain the status of belligerents. Such a doctrine can not be sound.

The courts can not give immunity to a tribe from responsibility because depredations by some of its members are increased in quantity and in violence and aggravated by resistance to military force; the authority of the tribe in making war is the only shield from responsibility for depredations by its members.

The So-called Band Can Not Discharge a Liability.

The theory of this law is that the tribe is to answer for the damages of its members. § 5 provides for judgment against the tribe of Indians and § 6 for the deduction from their annuities or other funds of the amount of the judgment. These sections clearly contemplate that the tribe whose amity is to be found and against whom the judgment is to be rendered is the kind of an organization which could as a body hold annuity or other funds or for whose benefit appropriations may be collectively made. We should not contend that judgments may not be rendered against tribes without funds or appropriations; but the party defendant must have sufficient separate existence to be the proper subject of treaty recognition and separate appropriations. This is more fully discussed in our brief in the Montoya case.

Dull Knife's band had no separate "tribal, political or military" existence before the events here discussed and none afterward. The few survivors of Dull Knife's band resumed their residence with their own tribe, and Little Wolf's band disappeared entirely. Neither of these was ever such a band as could appear as a party defendant, or respond to a judgment, or could have separate annuity or other funds.

Recognition by Act of Congress.

The Court of Claims, in its opinion, dismisses with slight consideration the important argument, bearing on the recognition of the proper responsible tribe in this case contained in the acts of May 17, 1882, and July 4, 1884 (22 Stat. L. 86; 23 *id.* 95). These were appropriations to pay claims similar to this. The first is as follows:

"To pay the following claimants named in the letter of the Secretary of the Interior of February eighth, eighteen hundred and sixty-two, being Senate executive document numbered one hundred, Forty-seventh Congress, first session, for damages suffered from the raid of the Northern Cheyenne Indians in September, eighteen hundred and seventy-eight, to be paid from the unexpended balances of treaty funds belonging to the Northern Cheyenne and Arapahoe Indians, which are hereby reappropriated for the purpose, namely:"

Congress declared these to be depredations by the Northern Cheyenne Indians, gave no recognition to subdivisions of the tribe in fixing responsibility for the depredation and ordered payment from the funds of the Northern Cheyenne and Arapahoe Indians.

If Congress had established by clear and positive language in the general act of 1891 a different rule from that fixed by the special acts of 1882 and 1884, the courts would be bound to follow that rule; but where the establishment of a different rule requires a wide range of discussion, it is a strongly persuasive element in reaching a just conclusion that Congress followed in these previous acts a line of policy with which the terms of the act of 1891 are plainly consistent. And as to this raid, it is a positive declaration that the Northern Cheyenne Indians were the perpetrators.

Who Is the Proper Defendant?

Having thus shown that Dull Knife and Little Wolf's bands are not the proper parties defendant, the question arises, Against whom should this action be sustained? There are two possible defendants, and it is immaterial to the appellants against which the judgment is rendered, since the court finds both to have been in amity with the United States. These Indians were members of the Northern Cheyenne and Arapahoe tribe. The treaty of May 10, 1868, the last treaty with these Indians, (15 Stat. L. 651), was with "the Northern Cheyenne and Arapahoe Indians." Appropriations were made for this tribe under this treaty at the very time of this depredation (act of August 15, 1876, 19 Stat. L. 186; act of March 3, 1877, 19 Stat. L. 280; act of May 27, 1878, 20 Stat. L. 74; act of February 17, 1879, 20 Stat. L. 304). The act of August 15, 1876 (19 Stat. L. 186) also contains a provision "that said Northern Cheyennes and Arapahoes shall remove to their reservation in the Indian Territory." The same designation is also given to them in the agreement made September 23, 1876, "with certain bands of the Sioux nation and also with the Northern Cheyennes and Arapahoes" ratified by act of February 28, 1877 (19 Stat. L. 254).

We submit that the real band, tribe or nation, whose amity is to be found is the Northern Cheyenne and Arapahoe tribe; that this tribe is the proper defendant, and that judgment should be rendered against them and the payment ultimately come out of their funds, subject to the policy of legislation adopted by Congress in modification of section 6 of the act of 1891 (act of March 3, 1899, 30 Stat. L. 1245).

Perhaps it might be argued in behalf of this tribe that the executive department separated these Indians into

two divisions, those remaining north and those going south. Much could be said in support of this executive recognition of these two divisions, although Congress in the act of 1876, above quoted, recognized but the single tribes. It is immaterial to this appellant which party defendant is selected, but the weight of argument would seem to be in favor of recognizing the tribe which appears in treaty and statute, and we submit that the judgment should be awarded against that tribe.

Conclusion.

It is not possible to read the story of these Indians, as eloquently told in the opinion of Mr. Chief Justice Nott, without being moved at its tragedy. Yet, the claimant and his fellow-sufferers, including the twenty-six settlers who lost their lives at the hands of the Indians, were not wrong-doers and the Court of Claims, in the midst of the recital of the Indians' wrong, admits the settlers' misfortune:

"It is, indeed, most unfortunate that the unhappy frontiersman must suffer without remedy where the atrocities were greatest, while others can recover where the wrong done them was less."

The remedy of this claimant rests upon this statute, passed by Congress to give a remedy for long-unredressed wrongs and the statute alone is to measure his relief, undiminished by the distressing conditions which caused the Indians to invade his property.

Led too far by sympathy, in one respect the Court of Claims oversteps the boundaries established by the Constitution between the responsibility of the executive and the judiciary. The reasons for the outbreak are discussed in full and the court assumes to assert the righteousness of the Indians' cause. Nothing can be better settled

than that this is outside the province of the judicial department. If there was a war, the judiciary must accept the acts of the political branch of the Government in regard to it, as the policy of the Government, controlling all its branches. It can not assume any jurisdiction to decide between the United States and those with whom it wages war. In the domain assigned to the political departments, the judiciary can see no wrong in their authoritative action. It is the disregard of this principle and a warm sympathy for a gallant struggle that has obscured to the court below the rights of this appellant.

WILLIAM B. KING,
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Attorneys for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

EUTIMIO MONTOYA, surviving partner,
v.
THE UNITED STATES *et al.*

No. 278.
Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF CASE, ASSIGNMENT OF ERROR, AND ARGUMENT.

STATEMENT OF CASE.

This is an appeal from the Court of Claims from a judgment adverse to the claimant (32 C. Cls. 349) in a case arising under the Indian Depredation Claims Act of March 3, 1891 (1 Supp. R. S. 913; 26 Stat. L. 851).

The question involved is the meaning of the word "band," in that provision of the first section of the statute confining the jurisdiction of the court to claims for depredations committed by Indians of a "band, tribe or nation in amity with the United States," as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any

band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

The depredation is stated in the findings to have been committed (Rec. 4) "by the Mescalero Apache Indians, who were at the time allied with Victorio's band." The facts relating to the organization and acts of Victorio's band are set forth by the Court of Claims in finding 3 (Rec. pp. 2–4). This consisted of Indians of various Apache tribes or bands, including Mescaleros and Chiricahuas, and of Indians from Mexico, having in no case a majority of any single tribe. Its number varied from time to time, being as few as 13 on June 30, 1879, and over 250 in April, 1880. Its existence dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos reservation, although the exact date of the existence of a cohesive band under Victorio does not appear. Although steadily pursued by the army for two years or more, the band was not finally broken up until the latter part of 1880 by the killing of Victorio and nearly all who were then his followers. Victorio was among the outlaws all this time except about a month, and for the greater part of the time their recognized leader. Its membership likewise varied, being composed at first of only Chiricahua Indians, afterward including some from the Warm Springs Agency, later some of the Mescaleros, and accompanied from time to time by Indians from Mexico. Its objects were lawless,—robbery and murder.

The court holds that the word "band" in the act of March 3, 1891, means, as defined by Webster, "a company of persons united in any common design" (Rec. 10); that the depredation was committed by Victorio's band, and that, in consequence, the amity of Victorio's band is the material subject of inquiry. This band being found hostile, the court holds that it is without jurisdiction.

ASSIGNMENT OF ERROR.

The claimant avers that the court erred in dismissing claimant's petition on the ground assigned, that Victorio's band was not in amity at the date of this depredation, because the Mescalero Apache tribe of Indians, by members of which this depredation was committed, was then in amity, and judgment should have been rendered for the claimant against the United States and this tribe.

ARGUMENT.

It will be seen that this case involves only a definition of the word "band." The question is, however, not of great simplicity, since light on the meaning of this word in its special relation to Indians must be found not from dictionaries, as the Court of Claims has chiefly done, but from the Indian treaties, the laws relating to Indian affairs, the act of 1891 and the interpretation of that act by the courts.

I. The Positions of the Parties.

It is first desirable to find by reference to several adjudged cases exactly what the Court of Claims holds to be the meaning of the word "band." In the present case the "band" had a more or less continuous existence for several years, for a considerable time under the same leader; it was vigorously pursued by the United States army; it committed many depredations; and its members were always regarded as outlaws or robbers deserving extermination.

In the next case on the calendar, No. 279 (Conners *v.* United States, 33 C. Cls. 317) the "band" was a portion of the Northern Cheyenne Indians, called "Dull Knife's band." This band ordinarily lived in a separate hamlet on the reservation under a leader or spokesman without

authority, but had no other separate existence. About half the tribe, including this and three other similar bands, was moved from Dakota to the Indian Territory. There Dull Knife's and Little Wolf's bands were dissatisfied and lived apart from the others. Leaving the reservation together, they separated after two weeks. Each of these bands, upon committing depredations, is treated as a separate band whose amity is material.

In another case, Herring *v.* United States (32 C. Cls. 536) the band was recruited, under a somewhat prominent chief, from different tribes, not comprising a majority of any tribe. It varied in number from 40 to 200. It continued in existence for about two years, engaging continually in robbery and murder, and was frequently in conflict with militia forces. The Court of Claims there gave this definition of a band (p. 538):

"A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief."

The claimant's contention is that "band," named in association with "tribe or nation," is substantially of the same meaning as those words in respect to nationality and means a separate political division of a national character, capable of making treaties or conventions, of holding tribal funds and of declaring war and so recognized by the legislative or executive department of the Government. The claimant asserts that a party of outlawed Indians, made up either from a single tribe or scattered renegades from different tribes, does not

constitute such a band. By national character, is meant that appropriate to a domestic, dependent nation (Cherokee Nation *v.* George, 5 Pet. 1; Rec. 8).

The Indians committing this depredation being of the Mescalero Apache tribe, then in amity but attached to Victorio's hostile band, the court holds that the jurisdiction is defeated by the hostility of Victorio's band, while the claimant asserts that it is maintained by the amity of the Mescalero Apache tribe.

With this understanding of the exact positions of the two parties the meaning of the word can be sought.

II. National Meaning Shown by Uses of the Words Band, Tribe and Nation in Treaties and Statutes.

Use in Treaties.

The Indian treaties contain ample instance of the uses of these words. The oldest generally used the word "nation." See the following instances, the first treaties printed in the Statutes at Large:

1778	7 Stat. L.	13, Delaware Nation.
1784	"	15, Six Nations.
1785	"	16, Wiandot and other Nations.
1786	"	21, Choctaw Nation.
1786	"	24, Chickasaw Nation.
1786	"	26, Shawanoe Nation.
1789	"	28, Wiandot and other Nations.
1789	"	33, Six Nations.
1790	"	35, Creek Nation.
1791	"	39, Cherokee Nation.
1792	"	42, Cherokee Nation.
1794	"	43, Cherokee Nation.
1794	"	44, Six Nations.
1794	"	47, Oneida and Tuscorora Nations.
1796	"	56, Creek Nation.
1797	"	61, Mohawk Nation.

1798	7 Stat. L.	62,	Cherokee Nation.
1801	"	65,	Chickasaw Nation.
1801	"	66,	Choctaw Nation.
1802	"	68,	Creek Nation.
1802	"	70,	Seneca Nation.
1802	"	72,	Seneca Nation.
1802	"	73,	Choctaw Nation.
1803	"	74,	Delawares, Eel River and other Nations.

The only treaties during the period of twenty-five years covered by the foregoing in which the Indian parties are designated as tribes are those of 1795, 7 Stat. L. 49, with the Wyandot and other tribes, which had been called nations in the treaty of 1789 above cited, and that of 1796, 7 Stat. L. 55, with the "Seven Nations or Tribes of Indians denominating themselves the Seven Nations of Canada." That of 1785 with "All the Cherokees" gives no farther designation, but in Art. VI "the nation, or the tribe" is to give up offending members. The treaty next following the last in the foregoing list is that of 1803 with the Eel River and other "nations and also the tribe of the Kickapoos." After this date the Indian parties are called nations or tribes, without any fixed rule, some being nations in one treaty and tribes in the next. Thus the Creeks are called the Creek Nation in the treaties of 1802 (7 Stat. L. 68) and 1826 (7 Stat. L. 286) but the Creek tribe in that of 1832 (7 Stat L. 366).

In the treaty of 1826 with the Belantse-etea or Minnetaree tribe (7 Stat. L. 261) article 7 provides that the Indians will not supply arms to "any nation, tribe or band of Indians not in amity with the United States." This is apparently the first use of the phrase used in the act of 1891 now under discussion.

In the treaties of 1833 and 1834 with the Appalachi-

cola band of Indians (7 Stat. L. 377, 427) the designation "band" is applied to the same Indians who were also parties to the treaty of 1823 (7 Stat. L. 224) entered into with "the Florida tribes of Indians."

The treaty of 1855 with the Blackfoot and other tribes (11 Stat. L. 657) states that it is with the Piegan, Blood, Blackfoot and Gros Ventres tribes and the Flathead nation, consisting of the Flathead, Upper Pend d'Oreille and Kootenay tribes and the Nez Perce tribe. They agree to abstain from hostilities against the following-named nations or tribes of Indians, to wit: "the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arc, and Aunce-pa-pas bands of Sioux, and all other neighboring nations and tribes of Indians."

The treaty of 1864 (16 Stat. L. 707) was with the "Klamath and Moadoc tribes and Yahooskin band of Snake Indians." They are described in the treaty (Art. I) as "the tribes of Indians aforesaid" and (Art. IX) "the several tribes of Indians, parties to this treaty."

The treaty of 1854 (10 Stat. L. 1132) was made with the Nisqually, Puyallup and other "tribes and bands of Indians." The cession of the land is by "the tribes and bands of Indians" and in the covenants both by the United States and the Indians, they are called "the tribes and bands aforesaid."

The treaty of 1848 (9 Stat. L. 949) is with the "four confederated bands of Pawnees, viz.: Grand Pawnees, Pawnee Loups, Pawnee Republicans and Pawnee Tappage." They pledge their fidelity under the name of the Pawnee nation and agree not to make war on tribes "with whom said Pawnee tribes are at peace." The treaty is signed by the chiefs of the four bands separately under the respective names of the bands.

The treaty of 1831 (7 Stat. L. 355) is stated in its caption to be "with the tribe of Shawnee Indians residing at

Wapaghkonnetta and Hog Creek." In the preamble of the treaty and in its first, second, eighth and tenth articles the Indian party is described as "the tribe or band of Shawnee Indians." In the second article it is called "said band or tribe of Shawnees," and in the ninth article "said band of Shawnees."

Such uses of the words "nation," "tribe," and "band" might be multiplied. Those cited authorize the following conclusions:

(1) That nations, tribes and bands alike are recognized as names of proper treaty parties.

(2) That "nation" and "tribe" and "tribe" and "band" are frequently used interchangeably.

An examination of the entire series of treaties with some of the more important tribes will further establish these conclusions and will lead to others. We have selected to this end the Sioux and the Chippewa Indians, with whom many treaties have been made.

SIOUX TREATIES.

1815	7 St. L.	126	Sioux of the Lakes. The Indians are referred to as "the said tribe."
1815	"	127	Siouxs of the River St. Peter's. The Indians are referred to as "the said tribe."
1816	"	143	The parties named are "eight bands of the Siouxs, composing the three tribes called the Siouxs of the Leaf, the Siouxs of the Broad Leaf and the Siouxs who shoot in the Pine Tops."
1825	"	250	Teton, Yancton, and Yanctonies bands of the Sioux tribe of Indians. They agree that their "band or tribe" will never supply arms to "any nation or tribe of Indians not in amity with the United States."

1825	7 St. L.	252	Sioune and Ogallala tribes. The heading of this is: "Treaty with the Sioune and Ogallala tribes," but in the body of the treaty the parties are called "The Sioune and Ogallala bands of the Sioux tribe." They agree that their "bands" will never supply arms to any "nation, tribe or band of Indians not in amity with the United States."
1825	"	257	Hunkpapas band of the Sioux tribe. Similar provision to that in 7 Stat. L. 250.
1830	"	328	Medawah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux and the Confederated Tribes of the Sacs and Foxes.
1836	"	510	Sioux of Wa-ha-shaw's tribe.
1836	"	524	This treaty is made by "the chief braves, headmen, &c. of the Otoes, Missouries, Omahaws and Yankton and Santee bands of Sioux, duly authorized by their respective tribes." The treaty throughout speaks of the parties as "the tribes."
1836	"	527	Wapaakootah, Susseton and Upper Medawakanton tribes of Sioux Indians.
1837	"	542	Yankton tribe of the Sioux Indians.
1851	10 St. L.	949	See-see-toan and Wah-pay-toan bands of Dakota or Sioux Indians.
1851	"	954	Med-ay-wa-kan-toan and Wah-pay-koo-tay bands of Sioux or Dakota Indians.
1851	11 St. L.	749	Sioux and others. See compilation of Indian Treaties (1873), pp. 1047–1050. Treaty is with "the

			following Indian nations," viz: the Sioux or Dakotahs, Cheyennes, Arrapahoes, Crows, Assenaboines, Gros Ventre Mandans and Arrickaras. The Indian parties are uniformly called "the aforesaid Indian nations."
1858	11 St. L.	743	Yancton tribe of Sioux or Dacotah Indians. They are to cease depredations on the property "of any other tribe or nation of Indians."
1858	12 St. L.	1031	Mendawakanton and Wahpakoota bands of the Dakota or Sioux tribe of Indians.
1858	"	1037	Sisseeton and Wahpaton bands of the Dakota or Sioux tribe of Indians.
1865	14 St. L.	695	Minneconjon band of Dakota or Sioux Indians. Controversies between "The Minneconjon band of Dakota or Sioux" and "other tribes of Indians" are to be peacefully settled.
1865	"	699	Lower Brule band of Dakota or Sioux Indians. Contains the same provision.
1865	"	723	Two Kettles band of Dakota or Sioux Indians. Same.
1865	"	727	Blackfeet band of Dakota or Sioux Indians. Same.
1865	"	731	Sans Ares band of Dakota or Sioux Indians. Same.
1865	"	735	Yanktonai band of Dakota or Sioux Indians. Same.
1865	"	739	Onkpahpah band of Dakota or Sioux Indians. Same.
1865	"	743	Upper Yanktonais band of Dakota or Sioux Indians. Same.
1865	"	747	O'Gallala band of Dakota or Sioux Indians. Same.
1867	15 St. L.	505	Sissiton and Warpeton bands of Dakota or Sioux Indians.

1868 15 St. L. 635 In the introductory paragraph of the proclamation of this treaty the parties named are the "different tribes of Sioux Indians"; in the heading of the treaty they are called the "different bands of the Sioux nation of Indians." In Article VI the language is "said tribes of Indians" in one place and in another it is "of any band or tribe that is or shall hereafter become a party." Article IX speaks of "the tribes who are parties to this treaty." It is signed on behalf of the various "bands."

1874 18 St. L. 167 In the act of Congress of June 22, 1874, appropriations for support, use the following descriptions: "Sioux of Different Tribes," "different bands of the Sioux Indians," "Sisseton and Wahpeton bands of Sioux Indians" and "Yankton tribe of Sioux." Similar language is used in other appropriation acts.

1876 19 St. L. 254 The agreement of September 26, 1876, ratified by act of February 28, 1877, is made with "the different bands of Sioux Indians."

Here attention is particularly asked to the treaty of 1868, made with "the different bands of the Sioux nation," but described in the proclamation as "the different tribes of the Sioux nation." In general, the same indiscriminate use of these words appears. The Yanctons in these treaties and laws as cited are three times called the Yancton tribe and three times the Yancton band.

CHIPPEWA TREATIES.

1785	7 St. L.	16	Delaware, Chippawa and Ottawa nations of Indians. If any Indians commit a robbery, the "tribe" shall deliver them up.
1789	"	28	Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac nations.
1795	"	49	Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas and others. The Indian parties in this treaty are referred to uniformly as Indian tribes.
1805	"	87	Wyandot, Ottawa, Chipawa and other nations. The Indian parties here are throughout designated as "Indian nations."
1807	"	105	Ottoway, Chippeway, Wyandotte and Pottawatamie nations of Indians. The words "Indian nations" are used throughout.
1808	"	112	Chippewa, Ottawa and other nations of Indians.
1815	"	131	Wyandot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, Potawatimie tribes of Indians. Although designated as above in the caption the description in the introductory clause of the treaty is "the Chippewa, Ottawa and Potawatimie, tribes of Indians together with certain bands of the Wyandot, Delaware, Seneca, Shawanoe and Miami tribes." Article 3 refers to the fidelity to the United States manifested by the Wyandot, Delaware, Seneca and Shawanoe tribes, and article 4 recites an agreement between "the United States and the before-

			mentioned tribes or nations of Indians."
1816	7 St. L.	146	The united tribes of Ottawas, Chipewas and Pottowotomees.
1817	"	160	Wyandot, Chippeway and other tribes of Indians. The word "tribes" is used throughout.
1818	"	178	Deleware, Potawatamie and Chippewa tribes of Indians.
1819	"	203	The Chippewa nation of Indians.
1820	"	207	The Chippewa tribe of Indians.
1821	"	218	The Ottawa, Chippewa and Pottawatamie nations of Indians.
1825	"	272	Sioux and Chippewa and other tribes.
1827	"	303	Chippewa and other tribes.
1828	"	315	United tribes of Potawatamie, Chippewa and Ottawa Indians.
1829	"	320	The united nations of Chippewa, Ottawa and Potawatamie Indians.
1833	"	431	The united nation of Chippewa, Ottowa and Potawamie Indians. This refers to "the Chippewa tribe."
1833	"	442	The united nation of Chippewa, Ottowa and Potawatamie Indians.
1836	"	491	Ottawa and Chippewa nations of Indians. Article 1st speaks of the Indian parties as "nations" but article second calls them "tribes."
1836	"	503	The Swan Creek and Black River bands of the Chippewa nation.
1837	"	528	The Saganaw tribe of the Chippewa nation. This treaty contains a schedule of payments to chiefs "representing the several bands of the tribe of the Saganaws."
1837	"	536	The Chippewa nation.
1838	"	565	The several bands of the Chippewa nation comprehended within the district of Saganaw.

1839	7 St. L.	578	The Saganaw tribe of Chippewas.
1846	9 St. L.	853	The various bands of the Pottowautomie Indians known as the Chippewa, Ottawas and Pottowautomies and others, hereafter to be known as a nation to be called the Pottowautomie nation. The caption of the treaty describes the Indian parties as "various bands of the Pottowautomie, Chippewa and Ottawa Indians." Articles 1, 2 and 3 refer to "the said tribes of Indians." Article 4 to "the said united tribes of Indians." Article 5 to "said nation of Indians" and article 6 to "the said tribes of Indians."
1847	"	904	The Chippewa Indians of the Mississippi and Lake Superior. This treaty does not designate them either as band, tribe or nation.
1847	"	908	The Pillager band of Chippewa Indians.
1854	10 St. L.	1109	The Chippewa Indians of Lake Superior and the Mississippi. This treaty contains one article of agreement between the Chippewas of Lake Superior and the Chippewas of the Mississippi and settles a separate tract for each of a number of bands including the following: L'Anse, Vieux De Sert, La Pointe and Fond Du Lac.
1855	"	1165	The Mississippi Pillager and Lake Winnibigoshish bands of Chippewa Indians. This treaty grants separate reservations and annuities to these bands and the bands bind themselves not to commit depredations.

1855	11 St. L.	621	The Ottowa and Chippewa nations of Indians. This makes separate provision for the six bands residing at or near Sault Ste. Marie, the Beaver Island band and other bands. This treaty contains a provision that the tribal organization of the Ottowa and Chippewa Indians is dissolved and that further negotiations shall not be with a general convention of Indians but with those residing in the vicinity of any usual place of payment or immediately interested in the questions involved without the concurrence of other portions of their people. The treaty is severally signed in behalf of various bands named.
1855	"	631	Chippewa Indians of Sault Ste. Marie.
1855	"	633	The Chippewa Indians of Saginaw and that portion of the bands of Chippewa Indians of Swan Creek and Black River. This is signed separately in behalf of the Saginaw bands and the Swan Creek and Black River bands.
1859	12 St. L.	1105	The Swan Creek and Black River Chippewas. This treaty refers to the Swan Creek and Black River bands of Chippewas and unites the Munsee Indians with "the aforesaid band of Chippewas."
1863	"	1249	The Chippewas of Mississippi and the Pillager and Lake Winibigoshish bands of Chippewa Indians. This refers to various bands of Chippewas of the Mississippi and is signed severally for eight bands.

1863	13 St. L. 667	Red Lake and Pembina bands of Chippewa Indians.
1864	" 689	Red Lake and Pembina bands of Chippewa Indians.
1864	" 693	Chippewas of the Mississippi and Pillager and Lake Winnebagoshish bands of Chippewa Indians.
1864	14 St. L. 657	The Chippewas of Saginaw, Swan Creek and Black River.
1866	" 765	The Bois Forte band of Chippewa Indians.
1867	16 St. L. 719	Chippewa of the Mississippi. These Indians are referred to as the Chippewas of the Mississippi bands. A provision also occurs relative to "any person not a member of the Chippewa tribe."
1889	25 St. L. 642	The act of January 14, 1889, "for the relief and civilization of the Chippewa Indians in Minnesota" directs negotiations "with all the different bands or tribes of Chippewa Indians in the State of Minnesota.
1891	26 St. L. 992	In the Indian appropriation act of March 3, 1891, appropriations are made for the following Chippewa Indians: "Chippewas of the Mississippi," "Chippewas, Pillagers and Lake Winnebagoshish bands," "Chippewas of Red Lake," "Chippewas of Lake Superior," "Pembina tribe of Chippewas," "Otter Tail, Pillagers, Pembinas and Mississippi River Indians on the White Earth reservation," "Turtle Mountain band of Chippewas."

Uses In General Statutes.

In the general laws applicable to the management and government of Indians, the word ordinarily used is

"tribe," but both "band" and "nation" are used synonymously. In the provisions of the Revised Statutes relating to Indians, many such instances occur.

R. S. § 2079 (act of March 3, 1871) declares that "no Indian nation or tribe" shall be acknowledged as "an independent nation, tribe or power."

R. S. § 2080 (act of July 5, 1862) declares:

"Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized by proclamation to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done with good faith and legal and national obligations."

If the meaning of Congress in the enactment of this statute should be limited to tribes so described in the treaties, there is no provision for action against hostile "bands" or "nations."

R. S. § 2097 (act of July 26, 1866) provides that no funds belonging to any Indian tribe shall be applied otherwise than as stipulated in a treaty or by an express provision of the law.

In the very section R. S. § 2156 (act of June 30, 1834) which the Court of Claims has declared to be the measure of liability for Indian depredations, the words tribe and nation are used synonymously. Provision is made for compensation for depredations by "any Indian belonging to any tribe in amity with the United States"; but on complaint the Indian agent is to "make application to the nation or tribe"; and "if such nation or tribe" should neglect or refuse to make satisfaction, further steps should be taken.

The uses of these words in statutes are practically the same as we have found in treaties and lead to certain unassailable conclusions.

Definitions Drawn From Treaty and Statute.

With all these instances of the use of the words nation, tribe and band, the following conclusions may now be positively accepted:

(1) That treaties were made with Indian parties alike under the names of nation, tribe and band, each designating an organization recognized as having a separate political existence.

(2) That "tribe" was used interchangeably both with "nation" and with "band," being a generic term for the treaty party.

(3) That "tribe" sometimes designated a division of a nation and "band," sometimes a division of a tribe, and sometimes of a nation, having in either case separate treaty-making capacity.

III. National Meaning Shown by Use of Word "Band" in Act of 1891.

This now leads us directly to the use of these words in the act of March 3, 1891. We maintain that that act shows on its face an intent to use the word "band" in the sense used in these treaties, and as we have already defined it (*ante*, p. 4), an organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government. This latter we deem essential to a complete definition of the term, although not necessary to the adjudication of the present case. The words band, tribe or nation, we assert, are synonymous in requiring national character, although differing in degree and each alike refers to a "domestic, dependent nation" as defined by this court in Cherokee Nation *v.* Georgia (5 Pet. 1; Rec. 8).

We do not deny that the definition of the Court of Claims, derived from the dictionaries, "a company of persons united in any common design" is a correct definition of the word "band" in certain uses. The Indians under Victorio may properly be called Victorio's band, but the word is used in the act of 1891 in the special meaning affixed to it by long usage in connection with Indian affairs. This will appear by an examination of the act itself.

Association of Words Implies Likeness.

The words "band, tribe or nation" appear in but one place in the act of March 3, 1891. Tribe and nation always have a national meaning. "Nation" is the term of the greater dignity, indicating a body politic either among white men or Indians. "Tribe" is equally a national designation, but appropriate only to savages. "Band," although also used in the sense defined by the Court of Claims, has the same national meaning in treaties, substantially equivalent to tribe. Placed here with "tribe" and "nation," both of which possess an exclusively national meaning, it should be considered as having a like national significance. It equally designates a separate political existence, but, as "tribe" is less dignified than "nation," so "band" generally possesses less dignity than "tribe," although none the less a designation of nationality.

This is a case for the application of the maxim *noscitur a sociis*. The rule is admirably stated in Black's Interpretation of Laws, page 135:

"Associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it."

Nesbitt *v.* Lushington (4 Durn. & E. 783) was a case where corn forming a part of a cargo protected by a policy of marine insurance was seized by a mob off the coast of Ireland during the famine. In a suit on the policy, Lord Kenyon, C. J. said (p. 787):

"That which happened in the case, does not fall within the meaning of 'arrests, restraints and detainments of kings, princes, and people.' The meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis;* it means 'the ruling power of the country.'"

Buller, J., concurring (p. 788), said:

"Then having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes and people, of what nation, condition, or equality whatsoever.' Those words, therefore, must apply to 'nations' in their collective capacity.'

It was also decided by Lord Tenterden (Cotton *v.* James, Mood & M. 273) that a statute of bankruptcy, declaring that any fraudulent "gift, transfer or delivery" of property shall constitute an act of bankruptcy, applies only to such deliveries as are in the nature of a gift, such as change the ownership of the property, to the prejudice of creditors; it does not include a delivery to a bailee for safe keeping.

The opinion says:

"This is no act of bankruptcy. The word 'delivery' is one certainly of very general signification; but standing as it does in the statute 6 G. 4, C. 16, § 13, connected with the words 'gift or transfer,' I incline to think it must be confined in interpretation to transactions of the same nature."

The doctrine is clearly applicable here. The word "band" is to be construed in the light of the general

meaning of its associated words as possessing the characteristic common to them, separate nationality. The purpose of Congress was to say that the amity to be found in any case was to be that of the political body to which the depredator belonged. The word "band" was put in because that is one of the names by which the treaty-making parties are designated in treaties. To give to the word "band" in this connection the meaning of a gang of thieves or a village community is to put it in a classification entirely apart from the associated words.

"Tribe" Used as a Synonym for "Band, Tribe or Nation."

After its use in this place the word "nation" disappears from the act. "Band" is used but once more, and then in connection with "tribe." The claimant is directed in § 3 to set forth in his petition the "tribe or tribes or band of Indians" committing the depredation. Why was nation omitted? Because the whole meaning of nation was expressed in "tribe or band." The word tribe is used alone in the remaining places in the act, because it includes in the one word both nation and band, as a separate political organization.

Section 5 provides for the determination by the court of the value of the property taken and destroyed "and, if possible, the tribe of Indians" by whom committed and judgment shall be rendered "against the tribe of Indians." Section 6 provides that the amount of the judgment "rendered against any tribe of Indians" shall be charged against "the tribe," and provides for its payment from "annuities due said tribe" or "any appropriation for the benefit of said tribe." It further provides that the amount shall remain "a charge against such tribe" and be deducted from funds hereafter due "such

tribe." By § 10 a right of appeal is given to "the tribe of Indians."

The simplest way in which these provisions can be understood is that the same body of Indians the amity of which is to be determined is the body to be charged in the petition with the depredation, against which a judgment is to be rendered, from whose funds the amount of the judgment is to be deducted, and to whom is given a right of appeal to this court from an adverse decision below.

The word "tribe" must indeed include "band" as used in all these places. Suppose, for instance, a depredation were committed by members of the Pillager band of the Chippewa tribe, after the dissolution of the tribal organization in 1855 (11 Stat. L. 621; *ante*, p.) and after the official recognition of that band by the treaty of 1865 (12 Stat. L. 1249; *ante*, p.). They were then members of a band but not of a tribe. The amity of that band, all are agreed, would have to be found under § 1 and, under § 3, the claimant would have to set forth that band in his petition; but would it not be the court's duty under § 5 to find this band as committing the depredation and to render judgment against it, although the law uses the word "tribe"? The judgment against the band would under § 6 be charged against the funds of the band, and the band would have a right to appeal. All this would be because the word "tribe" comprehends all Indian bodies, whether called "nation," "tribe" or "band," having a separate political organization and capable of making a treaty, holding funds or being sued for the trespasses of its members. In just this way is the word "tribe" used throughout the opinion of this court in Marks *v.* United States (101 U. S. 304).

It is therefore insisted that "tribe" used later in the act includes "band," tribe or nation" and that each

word alike is used in a national sense. One word of the group can not be given a wholly separated meaning.

"Amity" Implies Nationality.

The very use of the term "in amity with the United States" implies sovereignty, although limited, or nationality, although dependent. An individidual can not be spoken of as in amity or at peace with the United States. This is said only of a nation. It can not correctly be said of a band of cut-throats or an organized gang of burglars. This court, in Marks *v.* United States (161 U. S. 304) treats these words as the opposite of "in hostility with the United States." This emphasizes the idea of national existence or sovereignty. If a band of murderers and robbers like Victorio's, whether white or Indian, is engaged in law breaking, its violations of law do not rise to a dignity which entitles it to be said "to be engaged in hostility."

Victorio's Band Had No Nationality.

But this band of Victorio's had no national existence; its organization was for robbery and murder. A nation must at least have territory and citizenship; but Victorio's band had no ground which it could call its own, and all its members belonged to some nation, tribe or band of Indians. They absented themselves awhile from the territory of their tribe and from association with its law-abiding members, but they neither forsook their membership in the tribe nor their right to a place in its territory. Victorio's band was not the kind of a band referred to in the many treaties already cited.

IV. National Meaning Shown by Prior Statutes in Pari Materia.

This view of this act is confirmed also by previous legislation on the same subject. The second paragraph

of the act of March 3, 1891, grants jurisdiction to the Court of Claims to consider also claims arising under the act of March 3, 1885 (23 Stat. L. 376). This provides for the examination of claims "chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States," and the Secretary of the Interior is then directed to report "by what tribe such depredations were committed."

This act, it will be seen, uses only the word "tribe" and the responsibilities to be considered are tribal responsibilities, but can it be questioned that the word "tribe" in this case means any treaty party, whether designated as band, tribe or nation? But it is equally clear that it does not mean a depredating band of renegades like Victorio's; they had no tribal obligations.

The Court of Claims has declared in many cases that the act of 1891 does not grant rights but gives a remedy. This is stated in Corralitos Stock Company *v.* United States (33 C. Cls. 345):

"Every claim here pending under the remedial statute of 1891 must turn back to the statute of 1834 to establish a right of recovery. This act limits the claims to those arising from depredations committed by 'any Indian or Indians belonging to any tribe in amity with the United States,' and fixes the place of loss as "within the Indian country,' or any 'State or Territory inhabited by citizens of the United States.'"

The same doctrine is expressed in McKinzie *v.* United States (34 C. Cls. 285):

"The act of 1891 (26 Stat. L. 851) did not create liabilities. The jurisdictional statute merely provided a method of adjudicating the claims for payment as they already existed as liabilities of the depredators."

The provision of the act of 1834 on which the court

holds that the rights of claimants depend (act of June 30, 1834, § 17, 4 Stat. L. 731), uses the word "tribe" alone. If the Court of Claims' decision in the present case is correct, an entirely new condition was introduced in the remedial act. Whereas, under the act of 1834 this claimant could have recovered on showing that the tribe was in amity, that court says that under the act of 1891 he must show that the marauding band to which the depredating Indians were temporarily attached was in amity, whatever the status of the tribe. It can not be doubted that the word "tribe" in the act of 1834 included nation, tribe or band, wherever national capacity existed. So equally does the expression of these three words in the act of 1891 include in each alike the idea of a national organization. Both acts make the same test of amity, that of the body politic of which the depredators were members.

V. National Meaning Shown by Treaty Provisions in Pari Materia.

In Leighton *v.* United States (161 U. S. 291) this court said (p. 296):

"Many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise."

See similar references to such treaties in Leighton *v.* United States (29 C. Cls. 331).

In many of these treaties the provision holding the Indians to account for depredations is in these or similar words:

"Should any one or more of them violate this pledge * * * the property taken shall be returned, or in de-

fault thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities." (Revision of Indian Treaties, pp. 381, 328, 463, 538, 563, 568, 627, 640, 653, 726, 803, 805, 980, 982, and 1045.)

In others the provision is in these or similar words:

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one * * * subject to the authority of the United States * * * the Indians herein named solemnly agree that * * * the person injured shall be reimbursed for his loss from the annuities, or the monies due or to become due to them under this or other treaties made with the United States." (Revision of Indian Treaties, pp. 137, 319, 328, 528, 915, 932, 984.)

This was the language considered in Marks *v.* United States, 161 U. S. 299.

All these treaties, whether made with the Indians designated as bands, tribes or nations, are based on the theory of a national responsibility for the acts of the members of the band, tribe or nation making this provision. The protection is against the acts of "any one or more of them" or of "bad men." It makes no difference whether a single Indian was the wrongdoer or whether a number of wrongdoers united in a tribe and forming a band for a common object commit the depredation; in either case the tribe itself became responsible. If the wilful acts of the bad men in violation of law continue to such an extent as to oblige troops to be called out against them, this creates no new nationality, nor does it relieve the existing tribe from responsibility in accordance with treaty stipulation. The decision of the Court of Claims introduces an entirely new element into the subject of tribal responsibility for depredations and gives relief to the tribe from its treaty stipulation, if the "bad men" are

numerous and maleficent enough to require armed intervention to stop their murderous proceedings.

The true reading of the act of 1891 treats the tribe responsible under these treaties as the body whose amity or hostility is material.

VI. Results of the Court's Construction.

The Court Disregards the Permanent Relation.

In the present case the court finds that the Indians who committed this depredation were members of the Mescalero Apache tribe and formed a part of Victorio's predatory band. Victorio's band was hostile; the Mescalero Apache tribe was in amity. Whose amity is to be determined? If these depredating Indians belonged to the Mescalero Apache tribe the court has jurisdiction, and that tribe is liable because in amity. If they are regarded as members of Victorio's band, that being hostile, the court has no jurisdiction. Does the court give any reason why the band's hostility should overcome the tribe's amity? The depredating Indians' allegiance to the Mescalero Apache tribe is permanent; their relations to Victorio's band were temporary. Why should the temporary membership govern rather than the permanent? The intent of the act is clearly shown by associating band, tribe and nation together, and the question for determination is the amity of that organization to which the depredators belonged, which had the characteristics common to these three designations; such as national existence, treaty-making power, or the capacity to hold funds. The Court of Claims, on the contrary, disregards the membership of these Indians in the Mescalero Apache tribe, where is their real allegiance, overlooks the amity of that tribe, and holds that the material fact is their

temporary association with a band of cut-throats engaged in lawbreaking and pursued by the army.

If "band" be used in this act in the sense asserted by the Court of Claims, the number is quite immaterial. When Victorio's band consisted of but 13, it was, if the Court of Claims be correct, as much capable of waging war and making peace as when it had over 200 members. If we so define the word, it may be supposed that a claimant may be denied compensation for a loss occasioned by five individuals declaring themselves hostile, out of such a nation as the Sioux, let us say, with its forty thousand other members quiet and at peace.

The logical result of the decision rendered in this case leads to such conclusions that its premises must be held unsound. The word "band" is used in this act in a political sense, and not in that of the lexicographer; it denotes a body having a separate political existence, which may be held to liability and may be used interchangeably with tribe and nation, in just the same meaning as in the laws of the land from the earliest days.

The Court's Construction Disregards Belligerent Rights.

Another consequence results from the doctrine of the Court of Claims in this case, demonstrating its incorrectness. If an organization of Indians possessing national characteristics and called either "nation," "tribe" or "band," is at peace, the law makes it answerable for depredations by its members. The court below holds in this case that if some of its members associate themselves with others from other tribes and enter on a career of depredation and murder and are pursued by the army, the tribal responsibility ceases. It is rather a startling consequence that tribal responsibility is lost without the act

of the tribe or the permanent severance of the member from the tribe.

The converse of this position is equally untenable. If a tribe engages in war, the act of 1891 provides, it is not responsible for the depredations of its members. Yet the Court of Claims must, to remain logical, hold that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. How can it be that belligerent rights of the tribe are lost by the acts of a minority in opposition?

The correct rule is that the body whose amity is to be found is the body answerable for the depredation and that this is the body, whether called nation, tribe or band, which has a capacity for treaty-making and for holding funds as a separate political organization.

Possibly it may be said, in response to this view, that the marauding band whose amity the Court of Claims says is at issue is the party defendant which is to be charged with responsibility. That, indeed, seems to be the position taken by that court in Salois *v.* United States, 33 C. Cls. 335. But the temporary purpose and varying constituency of such a band, as in the present case, render it impossible to make it a party defendant. Where is Victorio's band to-day? Its existence, too, was unlawful from the beginning and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself. But the suggestion may be conclusively answered by noting that the act of 1891 uses tribe alone in designating the responsible party and that this word may appropriately include a band of national character, but can not include a marauding band of thieves like Victorio's.

The Reason for Belligerent Rights.

Special force is given to this by considering the reasons underlying the distinction in responsibility on account of amity or hostility. Why is a tribe committing depredations in a state of flagrant war not answerable for losses occasioned by it, while the tribe is answerable if the depredations are committed by its members in time of peace? This has been well stated by the Court of Claims in the elaborate opinions in Leighton *v.* United States (29 C. Cls. 288) and Love *v.* United States (29 C. Cls. 332), the former affirmed by this court (161 U. S. 291). The court say in the Leighton case (p. 325):

"The Indians being within the jurisdiction and control of the United States as 'domestic dependent nations,' it is their duty to submit to the constituted authorities; but if, instead of submitting, they resort to arms, as a band, tribe, or nation, to maintain or contest their rights, a want of amity *in fact* arises, and by reason of their recognized tribal relations by the political departments of the Government and the favorable rules of interpretation to which they are entitled, their rights as belligerents will be respected by the court in construing the remedial act of 1891."

In the Love case, they say (29 C. Cls. 348):

"Where war and not amity was the international condition of the time and the taking or destruction of property was the exercise of a belligerent right, the loss, like the losses of other citizens in other ways, must be borne by him on whom it falls, unless the Indian defendants assumed a liability for war indemnities by treaty or it was imposed as a condition to peace. Conversely, the Indian defendants can not set up their own unlawful acts of violence as a defence. To avoid liability they must show, or it must appear, that the depredation was the taking or destruction of property in the exercise of a belligerent's right to wage war."

It thus seems that the Court of Claims has recognized that the very ground of the freedom of the tribe from responsibility in war rests upon belligerent rights as recognized in international law. The tribe is not responsible for war losses because it has a right to declare war, and depredations thereafter are an incident to war. This is a doctrine based, indeed, on the very early decisions of this court (Cherokee Nation *v.* Georgia, 5 Pet. 1; Worcester *v.* Georgia, 6 Pet. 515) referred to in the opinion in this case (Rec. 8). The reason of the statutory distinction has not been as fully stated by this court, but it appears in the reasoning of the court in Marks *v.* United States (161 U. S. 302). Viewing therefore the immunity of the tribe from liability in war as based upon its belligerent rights, it necessarily follows that the right can only arise on behalf of some organization of capacity to declare war and peace. It is wholly inconsistent with this reason to hold that belligerent rights may arise on the part of a body or band of Indians which had none of the attributes recognized in Worcester *v.* Georgia (6 Pet. 548) quoted by the Court of Claims in this case (Rec. 8) where in reviewing the policy of Great Britain in relation to the Indians adopted by this country, this court said:

"She considered them as nations capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligation of which she acknowledged."

The language quoted further in the same passage and that from Holden *v.* Joy (17 Wall. 211) also quoted, marks this distinction.

No Belligerent Rights in this Case.

A band of outlaws made up from turbulent elements of various tribes has no right to declare war or make peace.

In this case the Chiricahua and Mescalero Apaches as Indian tribes were at peace. Their majorities remained on their reservations. The case was that described by the Court of Claims in the opinion already cited in Leighton *v.* United States, 29 C. Cls. 326:

"In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

A few turbulent spirits left the reservations, joined others of like character from other reservations, broke the laws of the United States, robbed and murdered citizens and defied the soldiers, acting as military police, sent after them. It can not be said that with this organization for purposes of plunder arose a new Indian nation with whom treaties were to be made and who were to be recognized as lawfully robbing and murdering in the exercise of belligerent rights. Could they gain a new political existence because the United States uses its army as a police force against Indians? There is certainly no fact shown in the history of these Indians either in the findings of the Court of Claims or elsewhere to indicate that the political branch of the Government regarded them as other than law-breakers to be subdued. They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victorio, they returned to their reservations and resumed their relations with the Mescalero or Chiricahua or other tribe to which they belonged.

Thus we see that the very reason for granting belligerent rights is wanting in the case of a disorganized and robber

band without national character. The responsibility of the tribe to which these Indians belonged, for their depredations, is not changed. The tribe itself has not declared war. Its responsibilities are not reduced by the union of its renegades for whose depredations it is responsible with other renegades from other tribes, requiring together pursuit by the army.

The law makes the band, tribe or nation to which the depredator belongs responsible for his acts so long as it is in amity. That responsibility ceases only when the band, tribe or nation itself engages in hostility. The very occasion for the exercise of the responsibility is the wrongdoing of the individual.

VII. Recognition by the Political Departments.

In our definition of "band" (*ante* p. 4) we stated that the band contemplated in the act must be one which had been recognized by the political department of the Government. That is not a part of the definition essential to the decision of the present case, since Victorio's band had none of the characteristics of a band, tribe or nation such as the act of 1891 contemplates. It is none the less a material element in a correct definition. This court has in numerous cases held that the recognition of political rights devolves upon the political department of the Government. In Holden *v.* Joy (17 Wall. 211) this court said (p. 242):

"Laws have been enacted by Congress in the spirit of those treaties, and the acts of our Government, both in the executive and the legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts."

In Fellows *v.* Blacksmith (19 How. 366) the court thus

declares (p. 372) the bonds between the political and judicial departments in the ratification of an Indian treaty:

"An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and headmen of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress."

In the case of United States *v.* Holliday (3 Wall. 407) this court said on this point (p. 419):

"The facts in this case certified up with the division of opinion, show distinctly 'that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved.' In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."

The same doctrine was declared in the case of the Kansas Indians (5 Wall. 737).

It is not claimed that the only bands, tribes or nations whose amity is to be found under the act of March 3, 1891, are those with which treaties have been made. The

Court of Claims in Graham *v.* United States (30 C. Cls. 333), declares very soundly as follows:

"By this treaty 'with the representatives of the Sioux Nation,' *i. e.*, the chiefs and headmen of the 'different bands of the Sioux Nation of Indians,' they are recognized in their dual capacity as a nation and as separate bands composing the nation. And when that national or tribal relation has been established by the political departments the courts are bound by it. (United States *v.* Holliday, 3 Wall. 407.) Not that Indians under treaty relations only are suable under the act of 1891, but that by such treaties the relations of the Indians in their organized or tribal capacity is thereby fixed and recognized." (Kansas Indians, 5 Wall. 737).

It is insisted, however, that there must be some political recognition of the national character of the Indians. If by treaty, that must govern. If by appropriations for their support, where divisions are recognized which do not appear in treaty, these are within the terms of the act of 1891. Whenever a division appears as duly recognized by the political department of the Government whereby the treaty-making power is conceded or the right to hold separate tribal funds, then the courts may treat these Indian parties as bands, tribes or nations within the meaning of the act of 1891. They are to be charged in the petition, their amity is to be alleged and proved, their responsibility for the depredation is to be fixed by the judgment of the court and their funds are to answer.

CONCLUSION.

The framers of this act, finding the Indian tribes described in treaties sometimes as nations, sometimes as tribes, sometimes as bands, desired to avoid any uncer-

tainty as to the amity to be found b by using all three
synonymous words in the opening of the act; after that,
the less used words were dropped and d the single com-
prehensive word "tribe" stood throu ghout the act for
them all. Each word means alike an organization
having a distinct national existence. Nationality can not
be newly acquired by union for breaki ing the law or laid
down when too close pursuit ren ders law-breaking
impracticable.

WILLIAM B. KING,
W. H. R ROBESON,
Attorn neys for Appellant.

Reply Br. of King & Robeson

Copy

Filed Dec. 17, 1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

MILTON C. CONNERS, Jr.,
Administrator,

v.

THE UNITED STATES and the NORTHERN CHEYENNE TRIBE OF INDIANS.

No. 44.

APPEAL FROM THE COURT OF CLAIMS.

Reply Brief for Appellant.

WILLIAM B. KING,
W. H. ROBESON,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

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MILTON C. CONNERS, JR., Administrator,
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THE UNITED STATES and the NORTHERN CHEYENNE TRIBE OF INDIANS. } No. 44.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

The brief of the Assistant Attorney-General admitting that a mere body of Indians united for a common purpose, is not a band within the meaning of the act of March 3, 1891, but that the body must have other properties, offers an issue so different from that presented by the opinion of the court, that it becomes necessary briefly to consider the case in its changed aspect.

The defendants now say (1) that the test of an organization among Indians is independence of other Indian authority; and (2) that such independence is achieved by the hostility of the body to the United States.

Before discussing these two propositions we ask attention to the composition of this body of Indians known in this case as Dull Knife's band, as declared by the court. We say:

(1) That the band did not have an organization (if it ever had one) until fired upon by the troops:

(2) That the band had no chief having authority;

(3) That it had never been recognized by the Indians or by the Government as a separate body;

(4) That if there was ever an organization of Dull Knife's band it was involuntary as to the Indians, having been effected by the hostile act of the troops in firing upon them;

(5) That the party was an insignificant minority of the Northern Cheyenne tribe, containing no foreign elements.

We have asserted that the Court of Claims was governed largely by the dictionary definition of the word "band." Evidence of this is found in the very last clause of the findings in this case, in these words:

"The *tribe* of Northern Cheyenne Indians was in amity with the United States, with the exception of those who composed the *bands* of Dull Knife and Little Wolf."

The opposed use of the words "tribe" and "band" in this sentence can not be taken to have any other meaning than that the court was considering the status of *a band of a tribe* of Indians.

It is our purpose to show that such has been the governing idea of the court in other decisions. In the case of *Herring* (32 C. Cls. 536) the court said:

"A band being the lowest and smallest sub-division, confederates more readily than any other form of corporate existence so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief."

What the court meant by "a *de facto* band" must be "a body of armed men," as the lexicographer puts it.

In the case of *Dobbs* (33 C. Cls. 308, 314) the court says, Nott (Ch. J.) delivering the opinion, that it departs

from its earlier position that a band is a body recognized as such by a treaty, or by the laws, or by the Indians, and that it will now recognize as bands those—

"which simply in fact existed, irrespective of recognition either by the Department of the Interior or the Indian tribes from which the members of the band came."

What can this mean but to declare that a "body of armed men," if Indians, is a band within the intent of the statute?

From these positions the Assistant Attorney-General dissents, saying in his brief in the companion case of *Montoya*, No. 43:

"It is admitted of course that there might be a band of Indians confederated together for a purpose which would be wholly lawful, and that a band of Indians might be confederated together even for an unlawful purpose—

* * * * * * *

without bringing themselves within the meaning of the statute."

But he continues, in effect, that if such a body is independent of other Indian authority, or if it become actually hostile, then it is a band within the statute.

Temporary Independence Not the Test.

If we admit that such a body of Indians, becoming independent of other Indian authority, is a band, as contemplated by the statute, we yet can not assent to that definition of independence which seems not to contemplate anything more than a mere temporary separation of the body from the parent tribe or tribes, during which it engaged in hostile acts.

By nature all Indians, we may say, owe an allegiance to Indian authority. It is not an allegiance based upon an intelligent comprehension of the necessity for govern-

ment and for fidelity thereto. The allegiance the savage owed was one of blood and birth. It was not to the organization, compelled by laws, but to the people, compelled by nature. So, when we speak of the independence of a body of Indians, not established by the recognition either of the Government or of the Indian tribes themselves, the inquiry goes rather to racial affinity than to a political independence such as civilized peoples achieve.

Dull Knife was a Northern Cheyenne as thoroughly as a Jew is not a Gentile. He spoke a different language from the Sioux, with whom his tribe was in a measure affiliated. He was different from an Apache in natural nobility of character. He differed from all Indians in the blood in his veins. He "belonged" therefore, to use the word of the statute, to the Northern Cheyenne tribe. He would have belonged to the Cheyenne tribe, but for the previous voluntary separation of that tribe into the Northern tribe and the Southern tribe and the prompt and continuous recognition by all authorities of the separated bodies.

Dull Knife's band, or to use the court's expression, "Dull Knife's party," had not received recognition as an independent body by the Indians, the Government officers or the laws—as the court specifically finds. More than this—it had not sought independence; and at the very time it was fired upon *it was secretly on its way back to its own people.*

Nor was the transfer of the body of Northern Cheyennes such a separation by the authorities as would establish a separation of the tribe; because it was accomplished with the assurance that if the party was not satisfied they should be returned. It was merely an experiment. Yet even if that experimental separation had effected any change in the tribal autonomy, it would have

extended no further than to make a separate band of the 937 Northern Cheyennes who were removed. The whole party with Dull Knife and the other headmen numbered but little more than a third of the body which had been removed to the Indian Territory.

Suppose this band had not been destroyed; but that it had scattered upon being attacked, and had made its way in small parties to the old hunting grounds. What would then have been its situation? Can it be denied that it would again have been merged into its own tribe? With such facility would tribal allegiance be put off or taken on! With such rapidity would a body of Indians achieve an independence which they did not seek, and lose one which they never esteemed; while the citizens whose herds were driven away and whose homes were reduced to ashes appealed in vain to the Government, which answered that a handful of depredators—a sixth, or a tenth of their tribe—was a separate, independent band in hostility, for whose misdeeds there was no liability, and against whose violence there was neither protection nor redress.

Does Hostility Make the Band Independent?

It is contended in the *Montoya* case that as the band under Victorio was organized for hostility, that made it independent.

This contention entirely ignores the argument already made in the *Montoya* case that hostility may not be imputed to any other bodies than those having some element of nationality.

And it can have no application whatever to Dull Knife's party because it never had any organization.

But let us consider whether actual hostility can make a body of Indians an independent organization.

If Victorio's aggregation of Indians had been at peace

could a judgment have been awarded against them for a depredation committed by the Mescalero contingent?

If Dull Knife's party had stolen horses a day before the troops fired upon them would judgment have been awarded against that body, which had not, and never would have, even in theory, anything with which to satisfy the judgment? Or against the Northern Cheyenne tribe, which had tangible assets?

In answer to these questions we adapt the Attorney-General's statement in his brief (p. 4):

"It is admitted of course that there might be a body of Indians confederated together for a purpose which would be wholly lawful and that a band of Indians might be confederated together even for an unlawful purpose without bringing themselves within the meaning of the statute."

Now if as the Attorney-General says, there may be bands which are not yet "bands" within the intent of the statute, why shall we not say that the Indians with Victorio and Dull Knife were such; and were not therefore responsible as bodies as long as they were in relations of actual peace? And that the several tribes to which they belonged would be responsible?

And do we not then resolve that the effect of the Attorney-General's argument is to maintain that the hostility of a party of Indians, not a band within the statute, makes it *ipso facto* a band within the statute?

And do not like results follow from the court's opinion which declares that prior to the removal of the Northern Cheyennes to the Indian Territory they were not a band in any sense? For they did nothing after their removal to accomplish their independence.

And we take from the court's finding in this case:

"These so-called bands had no autonomy and had not been recognized as separate entities. They were natural segregations of Indians leading a nomadic life."

And from the opinion:

"The so-called bands were not then bands in a tribal, political, or military sense."

And from the repeated statement that—

"The principle * * * was that a tribe in amity could not be made responsible for the acts of its members engaged in organized warfare."

Dobbs v. *U. S.* 33 C. Cls. 308, 314.
Salois v. *U. S.* 33 C. Cls. 326.

Are we not then thoroughly confirmed in our statement that the court holds that body which is not a band within the meaning of the statute to become, with the moment of hostility even though enforced, a "band" within the meaning of the statute?

If there can be such a thing, then there is named as proper defendants, in the statute, a party or body of Indians against whom it would be impossible to render a judgment; for not being a band until they became hostile, judgment against them could not be recovered, because they were hostile.

An Accidental Nation.

Moreover, if the Attorney-General's contention is correct, it results, that this band was created not by any treaties, nor by the laws of the country, nor by the recognition of the Government officers, nor by the recognition of the Indians themselves, nor by the voluntary hostility of the Indians, but by the enforced hostility of the Indians fired upon by a handful of troops, representing not a policy of a great government determined upon with the dignity or solemnity befitting so important a matter as the dismemberment of a tribe and the creation of other independent organizations, but acting under orders given in an emergency and in pursuance of the simple purpose to hold the Indians on the reservation.

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Certainly at the time of this hearing, it has resulted that a body of Indians has become a band within the intent of the statute by becoming hostile, while another body has become a band within the intent of the statute by refusing to become hostile.

The Reason For Different Terms.

The Attorney-General seeks to explain the use of the word "band" in the act of 1891 with the suggestion that in the course of the general legislation on this subject it had become known to the executive branch of the Government and to Congress that the Indians of the Southwest did not possess a national government; that they were divided up into numerous separate and independent bands, which severally had all the attributes of sovereignty ever possessed by any Indian tribe, and that it was the intention to provide against the hostility of a band. In this suggestion, the Attorney-General must have overlooked the fact that this is an act not designed to defeat claims for Indian depredations, but to provide for the payment of them, and that whatever language was employed by Congress in the act, unless in the nature of a prohibition or an express condition, must be taken as used to accomplish the general design of the act. Therefore may we not say with much greater reason that Congress was apprised from the treaties which constituted a part of its volume of laws, and from the statutes which had been passed by its body, that there were aggregations of Indians known to the laws as "nations," other aggregations known as "tribes," and others still known as "bands," and that as this act was a claim-paying act and not a claim-defeating act it was the intention of Congress in its employment of these three words to provide that a claimant who had lost property at the hands of the In-

dians should recover from the body to which they belonged whether known to the laws as a "nation" or as a "tribe" or as a "band."

The Tribal Obligation.

The Attorney-General, while admitting that the tribe is bound to restrain its own members, declares in the *Montoya* case that the Mescaleros "were not obliged to go to war with Victorio's band to reclaim former members of their tribe who had joined that band."

What application does this answer have in this case, where all the Indians who committed the depredation were members of one tribe, to control whom it would not have been necessary for the Northern Cheyenne tribe to go to war with another tribe?

Of course if there is any force to be imputed to this suggestion of the Attorney-General it must fit the conditions in both of these cases. That it can have no application is illustrated in the different compositions of the bodies of Indians who committed the depredations in these two cases.

Instances of Tribal Combination and Separation.

Confined to one reservation to-day, given the same rations of bread, meat and potatoes, given the same annuities, and paid the same amounts per capita, derived from the rent of their lands or from other sources, are maintained together two tribes whose misdeeds have filled many a page of the history of the great Southwest—the Kiowas and Comanches. Between them there is an irreconcilable difference of blood so vast that union between a Comanche and a Kiowa is aboriginal miscegenation. Yet the Government by numerous treaties with these two tribes has confederated them together (15 Stat. L. 589), and it results that the two bodies of Indians are

regarded as one tribe. In this illustration is afforded an instance of the establishment of a body of Indians by governmental authority—by the political branch of the Government.

Greatest among all Indian peoples have been the Sioux. Many treaties were made with them as a nation at times when they numbered forty or fifty thousand souls. Among these were numerous bodies of Indians scattered from Minnesota to Montana and from Kansas to the British possessions, but maintaining themselves in compact bodies and in different localities and having linguistic differences to a very considerable extent. When these facts were discovered this great nation of Indians was found to consist of ten or twelve bands, all recognized as separate and independent by the Indians; hence a similar recognition was given by the Government. That the recognition was just appears from the fact that when Red Cloud with the Ogallalas waged a war in 1866, which resulted in the loss of Lieutenant Fetterman and a hundred soldiers, Spotted Tail, the great chief of the Brules, was an ally of the United States. *Massacres of the Mountains*, pp. 481, 482.

The Ogallallas numbered in 1891, five thousand souls; the Brules, thirty-five hundred; the Yanktons, seventeen hundred; the Yanktonnais, four thousand (Rep. Commr. Ind. Affrs. 1891, vol. 2, pp. 78–85). All these were known and treated with as bands (14 Stat. L. 695–747). They are the "bands" of this statute.

The noblest Indian of this day is Chief Joseph of the Nez Perces, who in 1866 declined to sign the treaty which gave up to the whites the old home of his fathers. This action brought about a separation of the tribe and resulted in a transfer of a portion of the tribe to another and a distant location. In these two locations the two bodies of Indians were maintained as separate and dis-

tinct entities, so that when, in 1877, Chief Joseph went to war even his former brethren, the members of his tribe, joined the United States troops in his punishment. Here is afforded an illustration of the recognition of different bodies of Indians as bands, for this body under Chief Joseph is known to treaty and to law and to the court's decisions as Joseph's band of Nez Perces. That is a band such as this statute contemplates. *Woolverton* v. *United States*, 29 C. Cls. 107.

In New Mexico, from the earliest date when we have an acquaintance with its history, was another populous body of Indians, brave, warlike, intelligent and rich in flocks and herds, numbering perhaps twenty thousand souls — the Navajos. So far as official records go and so far as history goes, there was never by these Indians or by the Government a recognition of a single independent band among all this vast body.

And yet the dockets of the court show many cases where bodies of these Indians numbering five to a hundred, have swept through the prairies of New Mexico, driven away the cattle and sheep and taken captive or slain the unsuspecting herders.

Those bodies though performing these hostile acts are not the bands of the statute, but the "bad men among the Indians," for whose misdeeds very many of our treaties provide, that the tribe shall make compensation.

Who is the Proper Defendant.

Many nice refinements and distinctions have been built up in the construction of this act to which it is neither proper nor desirable to allude. Least maintainable of all, we submit, is that which invests with independence a motley body of Indians, who if white, would have been jailed as a mob of rioters; who if themselves the immediate subjects of a civilized government of their

own race would have been punished under its criminal laws.

The recital, in the opinion, of the cruel and heartless treatment of Dull Knife's party of Cheyennes will touch every generous chord in the human heart. Yet it is but one instance of many that may be told. Possibly in recognition of the mistakes we have made in our treatment of the savage tribes, the Government, though in theory it charges up these judgments to the tribes, pays them in fact out of its own coffers.

If for some depredation, committed before the troops fired on Dull Knife's party, a judgment should be rendered, the accounting officers would look in vain for the account to which that judgment was to be charged. Not because Dull Knife died, and those who were with him, but because they could not find upon their books or in any books the name of the departed chieftain as one who was known to our laws or treaties as the leader of a band, tribe, or nation.

Is it not more consonant with the very sense of the law and with the very reason of things to say that if a body of Indians was a "band" or a "tribe" or a "nation" it was that body which was to respond for the misdeeds of its members, and that it was the status of that body which was to determine the jurisdiction of the court;—and not the status of one or more of its several constituent elements or families whose members may have participated in the wrongful act?

It would appear that the Court of Claims gave the correct definition of the body of Indians to be held responsible, in the words:

"The Indian entity or body politic which may be entitled to receive annuities which is or may be recognized as such in the Interior Department, and consequently which may be liable to respond in damages (*Dobbs* v. *U. S.* 33 C. Cls. 315)."

There is a statute so clear and plain—so unnecessary to be interpreted and yet so comprehensive, that it points unmistakably the way to the proper settlement of these questions. It is that statute which recognizes *tribal organization*, and *its* status as determining the condition of hostility.

It provides R. S. § 2080, that—

"Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized by proclamation to declare all treaties with such tribe abrogated by such tribe, if in his opinion the same can be done consistently with good faith and legal and national obligations."

What better rule for determining the status of a tribe than this one which directs us to a consideration of the status of the tribal organization? What safer guide to a correct determination of what body of Indians is meant in the descriptive words of the act of 1891, than this, which recognizes hostility as possible only upon the part of a body *having a tribal organization?*

When formerly it seemed to the Court of Claims that a permanent and not a temporary body, a determinate and not a varying constituency, was a band or tribe, it said:

"Where a small body of Indians or a minority of a tribe, without the consent of such tribe, engage in such a raid, though they encounter United States troops and engage them in battle, the condition of amity between such tribe and the United States will not thereby be changed.

"In other words, the amity of the band, tribe or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on citizens and commit depredations." *Leighton* v. *United States*, 29 C. Cls. 288.

In the statute just cited, and in this opinion may be

found all the law necessary to determine these questions we have considered. To lose sight of them is to become involved in perplexing inquiries and subtle distinctions, such, we may venture, as were never contemplated by the makers of the law.

Instances of mistreatment of the Indians must be a part of our history. Volumes have been written on the subject. Instances of theoretical hardship, in being judgment debtors on account of depredations will multiply. But surely these shall not prevail to obscure the legal wrongs, or defeat the clear statutory rights of our citizens whom Indians have reduced to poverty and ruin.

Primary and Ultimate Facts.

In the argument of the preceding case a question was asked in regard to the right of this court to review the conclusions of the Court of Claims upon matters of fact deduced from primary facts found from the evidence. The rule uniformly followed was stated in *United States* v. *Pugh*, 99 U. S. 270. It is as follows:

"The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof; and the question of practice to be settled is whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal.

"To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of

evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined. If the case could come here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the court, had been agreed upon by the parties, and their agreement embodied in the record."

Other cases bearing on this point are *United States* v. *Clark*, 96 U. S. 40; *McClure* v. *United States*, 116 U. S. 151. In the case of *Marks* v. *United States*, 161 U. S. 297, the Court of Claims found that the Indians charged were not in amity with the United States. That did not prevent this court from taking up the primary facts found from the evidence and considering whether the ultimate conclusions of fact were justified by these.

WILLIAM B. KING,
W. H. ROBESON,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

MILTON C. CONNERS, JR., ADMINISTRATOR Milton C. Conners, deceased,
v.
THE UNITED STATES AND NORTHERN Cheyenne Indians et al.
No. 279.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

This is an appeal from a judgment of the Court of Claims in a suit brought under the Indian depredation act of March 3, 1891. (First Supplement R. S., 2d ed., p. 913.)

Conners, who was a citizen of the United States and a resident of Montana, brought suit for a depredation upon his property alleged to have been committed by Northern Cheyenne Indians on or about the 3d day of October, 1878, in the western part of Nebraska. Besides the

Northern Cheyenne tribe of Indians the petition joins with the United States as defendants the northern band of Northern Cheyenne Indians, the southern band of Northern Cheyenne Indians, Dull Knife's band of Northern Cheyenne Indians, Little Wolf's band of Northern Cheyenne Indians, the (Southern) Cheyenne and Arapahoe Indians.

The defendants plead that Dull Knife's band of Northern Cheyenne Indians, by whom the depredation was committed, was not in amity with the United States at the date of the alleged depredation. The claimant's replication averred that Dull Knife's band did not constitute an independent band, and that the Indians who committed the depredation complained of were members of a band, tribe, or nation then in amity with the United States. The court sustained the defendants' plea, finding that the bands of Dull Knife and Little Wolf were independent bands of Indians within the intent of meaning of the Indian depredation act, 1891; that they were not in amity with the United States at the time of the alleged depredation, and that the court was without jurisdiction. From this judgment the claimant appeals.

The sole question involved in this case is the meaning of the word "band" in the Indian depredation act of March 3, 1891, and the case is in all essential respects like the case of *Montoya* v. *The United States and Mescalero Apache Indians*, No. 278, on the calendar. Copies of the brief in that case are therefore filed in this, and upon the arguments in that case, mainly, the appellees rest their contention in this case.

ARGUMENT.

It is only necessary to add to the discussion in the case of Montoya a few words especially applicable to the circumstances in this case.

This case differs from that of Montoya in the fact that, while the continued military success of Victoria's band ultimately attracted to his standard many Indians from other tribes, Dull Knife's band was homogeneous from the beginning to the end, being composed wholly of Northern Cheyenne Indians. There is also a difference in the duration of the hostilities.

The former element of difference certainly does not lessen the right of the body to the title of an independent band; and the second is wholly immaterial. If the band was independent, and if the fact of hostilities at the time of the depredation be found by the Court of Claims, the duration of the hostilities can not alter the legal aspect of the case.

Neither is it material that when Dull Knife's band left the Indian Territory they did so without hostile intention. When or how the actual state of hostility shown by the findings of fact arose is immaterial, and the manner or purpose of their departure from the reservation can not affect their status as an independent band.

THE NORTHERN CHEYENNE TRIBE AND DULL KNIFE'S BAND.

Before the beginning of Sitting Bull's war in 1876–77 the Northern Cheyenne Indians had lived on the Red Cloud Reservation with the Ogallala Sioux. Although

it was recognized as a separate tribe, it was, like most tribes, no more than an aggregation of bands similar to that of Dull Knife. The bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow numbered in 1877 937 (Record, pp. 3, 4, and 5). Little Chief was another leader of a smaller band. His followers numbered 200, and they were being taken south by the authorities of the Government at the very time when Dull Knife and those with him were fighting the United States troops (Report Sec. Int., 1879, p. 81). The combined bands of these five chiefs then numbered 1,137 Indians, out of the total membership in the tribe of about 1,800.

It is true that the Northern Cheyennes were then regarded as one tribe, and that these bands had not been officially recognized as independent political entities prior to the time when the forced removal to the Indian Territory took place, in 1877. It is also true, however, that a change in the policy of the Government in that respect was indicated by this act of removal and by other acts which accompanied and followed the war of 1876-77.

During that war nearly the whole body of the Northern Cheyennes joined Sitting Bull. Their hostility had been so marked not only on this occasion, but in previous wars, that it seems to have led to a determination to break up their tribal organization. Although all but 300 or 400 of the tribe had left the reservation in the summer of 1876 (Report Sec. Int. 1876, p. 437), the United States Government made an agreement with this small remnant of the tribe in September, 1876, providing for the cessions of their rights in the Black Hill country

(19 Stat. L., 254). This treaty or agreement was signed by five chiefs or headmen of the Northern Cheyennes, *but not by a single one of the chiefs named above, who represented 1,137 members of the tribe.* This agreement was made in the face of a provision in the existing treaty with the Northern Cheyenne tribe (15 Stat. L., 655) which provided (article 8) that—

> No treaty for the cession of any portion of the reservations herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by at least a majority of all the adult Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as hereinbefore provided.

Since that time appropriations made for the benefit of the Northern Cheyenne Indians who remained in the north are made in connection with the appropriations for the Sioux Indians, under the agreement of 1876, and no appropriations are made for the Northern Cheyennes independently under the treaty of 1868, as was the practice up to the year 1876. (30 Stat. L., 70, 578, 931, and 19 Stat. L., 186, 281.)

This is incontestable evidence that the United States no longer recognized the existence of the Northern Cheyenne tribe which had made the treaty of 1868.

In pursuance of this policy, after the war with Sitting Bull had terminated and the Northern Cheyennes engaged therein had surrendered, it was proposed (in 1877)

to remove some of the bands south to the Indian Territory, and others west to the head waters of the Rosebud (Record, p. 9). In 1879 another band—that of Little Chief—was also separated from the Cheyennes who remained in the North and sent to the Indian Territory. The destruction of the tribe as such was complete; as stated by the Court of Claims in the opinion in this case (Record, p. 9):

> In 1878 the Northern Cheyennes no longer existed as an entire body or responsible tribe.

Let us now see what was Dull Knife's part in these transactions. It appears that he and his band had been among those who were engaged in Sitting Bull's war of 1876–77 (Record, p. 5; *Salois* v. *The United States et al.*, 32 C. Cls. R., 68). Some of the Northern Cheyennes surrendered early, but Dull Knife's band remained hostile and was attacked by Colonel McKenzie on the 25th of November, 1876.

Dissensions afterwards arose in the camps of the hostiles, and Dull Knife and his band turned against Crazy Horse and the Sioux, who were still hostile (Record, p. 5). During these hostilities Dull Knife's band "had been on the war path, acting independently of the other members of the tribe" (Record, p. 6). In 1877 the band, again acting independently, had fought with the Shoshone Indians (Report Sec. Int. 1877, p. 605). It had been hostile to the United States and absent from the reservation upon which other bands of the Northern Cheyennes were congregated at the time when the agreement for the sale of their lands was made with the United States in September, 1876, and, as we have seen, neither

Dull Knife nor his band was represented in that transaction (19 Stat. L., 254).

Although the court finds that the bands of Dull Knife, Little Wolf, Wild Hog, and Old Crow had no autonomy and had not been recognized either by the Government or by the tribe as separate entities (while they were on the reservation at Fort Robinson, in Nebraska), yet the history of Dull Knife's band before that time shows that it acted in absolute independence of the Northern Cheyenne tribe, making war while the tribe was at peace, and renouncing war, as an organized, independent band, when it suited the purpose of its leader to do so.

After the surrender in 1877 the band was kept on the reservation until the order for its removal, with several similar bands, to the Indian Territory.

The history of the band from that time is the history of an independent band stripped, whether by its own acts or by the acts of the United States Government, or by both combined, of all semblance of relationship or allegiance to any other Indian organization. Their status is perfectly described in the following extracts from the opinion of the court in this case:

> The bands of Little Wolf and Dull Knife * * * were operating as independent bodies distinct from and irrespective of all other Indians. Moreover, their acts were acts of war. It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States, but it was a case of the entire body waging armed resistance with all its might and with all the ferocity of Indian warfare against whatever power the United States

> could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war refutes the idea of a preexisting condition of amity and renders it preposterous. * * * To hold these warring elements of an Indian band, which was then isolated and in active hostility, as nothing more than a number of individual Indians not at war, but engaged in personal plunder while their tribe remained at peace, would be to defeat the purpose of all and each of the Indian indemnity acts. (Record, p. 9.)

INDEPENDENCE THE TEST.

In this case, as in the case of Victoria's band, we conceive that the true test of responsibility is the political independence of the band. If Dull Knife's band and those associated with him were independent of other Indian control, if they acted for themselves without the permission or hindrance of any other Indian authority and without the assertion of the right on the part of any other Indian authority to control their actions; if they continued so to act as an organization, how can it be said that they were not an independent band, entitled to all the rights which are possessed, under the laws and usages of the United States, by any Indian tribe or band?

BELLIGERENCY RECOGNIZED.

If Dull Knife's band was entitled to the rights of belligerents then it was, beyond question, an independent band within the meaning of the act of March 3,

1891. If it was not entitled to belligerent rights, then Dull Knife and every member of his band were guilty of robbery, arson, and murder. The light in which they were regarded is shown by their treatment when captured. They were "carried as prisoners of war to Fort Robinson." The ultimate disposition intended to be made of them was to return them to an Indian reservation. (Record, pp. 4 and 6.)

Thus it appears that they were granted the rights of belligerents. Is not this conclusive upon the courts?

Let the court read the history of the final outbreak of those Indians who were being held as prisoners of war, as given in the opinion of the court (Record, p. 7), and then say whether this was the treatment accorded by the United States to common lawbreakers held for ordinary civil offenses or a measure of stern military necessity; whether it partook of the nature of the exercise of civil authority or of the savage and barbarous measures of Indian war.

THE NORTHERN CHEYENNE TRIBE NOT RESPONSIBLE.

The alternative to the judgment rendered by the Court of Claims is to hold that the depredators belonged to the Northern Cheyenne tribe of Indians; that that tribe was bound to restrain them from committing depredations; and that, as a penalty for failing so to restrain them, the tribe must be mulcted in damages to the extent of the value of the property taken from the claimant.

The mere statement of this necessary alternative should be sufficient to demonstrate the correctness of the view

taken by the Court of Claims. We have seen that Dull Knife's band had acted in peace and in war independently of any control by other Cheyennes, and that the United States, by the agreement for the cession of the Black Hills, recognized the disrupted condition of the tribe and practically held that the Northern Cheyenne tribe recognized by the treaty of 1868 no longer existed.

If we assume, notwithstanding these facts, that the Northern Cheyenne tribe was still theoretically supreme over Dull Knife's band, capable of exercising control over his movements and responsible for his wrongful acts, certainly we must determine that the events which followed removed the band so completely from all semblance of such control as to place beyond the realm of argument the proposition that the tribe was thereby absolved from any preexisting responsibility for its acts.

In May, 1877, the four bands named above were removed from the reservation by the act of the United States Government without the consent of the remainder of the tribe, and without consultation with them. Dull Knife and his band were taken to the Indian Territory. They ceased to hold relations with the Northern Cheyennes who had been removed to the headwaters of the Rosebud. In the Indian Territory Dull Knife, with Little Wolf, had lived apart from other tribes and bands. Even if he had not, long before this time, severed his allegiance to the tribe by his own acts, he was at this period, by the act of the United States Government, as completely removed from the control of the Northern Cheyenne tribe as if he had been on another continent. It was after the

status of Dull Knife and his band of Indians had been thus emphatically determined, not only by their own acts and their recognition as an independent band by the Government of the United States, but by the very acts of the Government itself, that the band became hostile to the United States. It was during the continuance of such hostilities that the act complained of in the petition was committed. Before these hostilities were ended the bands had been exterminated. Dull Knife and a few of his band had been captured and held for a short time as prisoners of war, but finally escaped, were pursued, and exterminated, with the exception of seven, who were wounded, captured, and sent to the reservation.

To quote again from the opinion of the court in this case:

> It must likewise be held that where the United States engaged in war with a distinct portion of a tribe, acting independently of the tribe, over which the tribe can exercise no control, being in fact a distinct military command, the tribe in amity can not be held responsible for the acts of the hostile Indians. (Record, p. 9.)

The appellant's brief admits that the Court of Claims dismissed with slight consideration an argument based upon the fact that Congress, some years after the close of the war with Dull Knife's band, passed an act providing for payment, out of the funds of the Northern Cheyenne and Arapahoe Indians, of the losses sustained by certain claimants during the hostilities. It would seem that the Court of Claims acted wisely in dismissing this argument with slight consideration; it could not be

a construction of a statute which had not then been enacted; and, considered as a failure to recognize belligerents, it could not have any authority, since the action was taken a number of years after the occurrence of the hostilities. Recognition, or a refusal to recognize belligerents by the legislative power must be contemporaneous. Such declarations, subsequent to the event, have no force whatever.

From the time when the bands were first removed from the reservation under the authority of the United States Government, whatever may have been, theoretically, their relations to the tribe before that time, the Northern Cheyenne tribe, even if it still existed, had no more control over them than had the Sioux Nation over the Comanche tribe; and it would be as unjust to charge their annuities with payments for property taken by Dull Knife's band as it would be to charge such payments to any other Indian tribe selected by lot. It would be as equitable to charge England with the acts of her American colonies after the Revolution, or to hold France responsible for thefts committed by inhabitants of Alsace and Lorraine after the forced separation of those provinces from her domain.

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Brf. of A. G. (Thompson) in No. 278

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OCTOBER TERM, 1899.

EUTIMIO MONTOYA, SURVIVING PARTNER of the firm of E. Montoya & Sons,
v.
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

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APPEAL FROM THE COURT OF CLAIMS.

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STATEMENT OF THE CASE.

Montoya brought suit in the Court of Claims under the provisions of the Indian depredation act of March 3, 1891, alleging that certain Indians belonging to the Mescalero Apache tribe had, on or about the 12th day of March, 1880, taken from him property amounting in value to $5,750.

The act of March 3, 1891, provides for recovery for—

> All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States.

The Court of Claims held that the property of the claimant was taken by Indians who belonged to Victoria's band of Apaches; that that band was not at the time of the depredation, and had not been for two years prior to that time, in amity with the United States; and thereupon dismissed the petition. The claimant appeals from that judgment.

The contention of the appellant is that the court erred in finding that the band to which the Indians committing the depredation belonged was a band within the meaning of the act of March 3, 1891; that Victoria's band had not the capacity for hostility to the United States; that it was not an independent band; that the responsible entity against whom judgment should be rendered is the tribe or nation to which the band belonged, or to which the Indians who committed the depredation originally belonged; and that the band itself did not sustain a relation of hostility to the United States at the time of the alleged depredation.

The last contention, so far as it relates to the fact of hostility, as distinguished from the question of responsibility, is a question of fact which it would be appropriate to urge on motion for a new trial, but which is not raised by the record here. The ultimate finding of fact made by the Court of Claims, that Victoria's band was not in amity with the United States, supported as it is by the findings showing military activity on the part of the Indians and the United States, establishes the fact of hostility; and this court will not go back to those findings for the purpose of inquiring into the actual status of the Indians in that respect. The general question of the

meaning and application of the word "amity" in the act of March 3, 1891, in previous acts, is settled by the case of *Marks* v. *The United States et al.* (161 U. S., 297).

The other contentions made by the appellant are all resolvable into the one proposition that Victoria's band was not such a "band" as was contemplated by the act of March 3, 1891; and that is the sole question raised in this case.

WHAT IS A BAND OF INDIANS?

The statement of the case in the appellant's brief (p. 2) assumes that the decision of the Court of Claims rests solely upon the dictionary definition of the word band—"a company of persons united in any common design"—and does not hold that such band must be and in this case was a recognized political division among Indians. Even a cursory reading of the opinion of the Court of Claims will show that this assumption is incorrect. While the court did, of course, regard the ordinary meaning of the word as fixed by universal usage, it also considered the characteristics and customs of Indians, the recognition of their tribes as separate political entities, and concluded that Victoria's band was "long before that time known and recognized as a band separate and distinct in its organization and action." (Record, p. 5.)

The word "band" is not one which has a technical meaning. Subject to the requirements of the context, it is undoubtedly used in its ordinary signification, and must be so read. According to Webster a band is—

> A company of persons united in any common design, especially a body of armed men.

In the Century Dictionary a band is defined as—

> A company of persons, especially a body of armed men; a company of soldiers or persons united for any purpose.

The definition of the same word when used as a verb is, according to Webster—

> To unite in a troop, company, or confederacy; to confederate for some common purpose; to unite; to conspire together.

And according to the Century dictionary—

> To unite in a troop, company, or confederacy; to unite; associate; confederate for some common purpose.

It is indisputable that Victoria's band of Indians was a "band" in the ordinary sense of the term as fixed by common and universal usage. These Indians—not the particular ones who may have committed a depredation, but the recognized political body to which they belonged—were "a company of persons united in a common design;" they were "a body of armed men;" they were "united in a troop, company, or confederacy;" they had "confederated for a common purpose" and "conspired together."

Were they, then, such a "band" as was intended by the act of March 3, 1891? It is admitted, of course, that there might be a band of Indians confederated together for a purpose which would be wholly lawful, and that a band of Indians might be confederated together even for an unlawful purpose—so long as it did not involve hostility to the United States—without bringing themselves within the meaning of the statute.

The band of this statute must be a band capable of being in hostility against the United States. It is by inference something inferior to a tribe, as a tribe is inferior to a nation of Indians. The words are "any band, tribe, or nation." It must be in a measure independent, or it could not sustain a relation of hostility. On the other hand, it need not possess all the attributes of sovereignty, for no Indian tribe or nation has these, yet it is not disputed that such tribes and nations may be hostile within the meaning of the statute. It need not possess the capacity of making peace and war in the strictest sense of international law; for, as this court has said in the case of *Marks* v. *the United States et al.*) 161 U. S., 297):

> Without questioning these declarations and decisions, as applied to the relations between independent nations, we think they avail but little in the solution of the question here presented. That question is, What limitation did Congress intend by the words "in amity with the United States?" The word "amity" is not a technical term. It is a word of common use, and such words when found in the statute must be given their ordinary meaning unless there be something in the context which compels a narrower or different scope.

And further:

> We * * * are of the opinion that all that Congress meant was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation

> might be investigated and the amount of the loss determined and adjudicated by the Court of Claims.
>
> And if, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition [that the tribe was in amity] is not sustained.

Given independence (by which is meant independence of other Indian authority) and a purpose to resist the authority of the United States by force of arms, on the part of the Indian band; and on the part of the United States the long-continued prosecution of hostilities against this band by formidable bodies of troops, and the accordance to them of the rights and privileges of belligerents when captured or when negotiating for terms, and, resulting from the attitude of the opposing forces, many skirmishes and some pitched battles, in which many Indians and many soldiers lost their lives, ending with either the surrender of the forces of the Indians under the regular forms and customs of war (which was the outcome in the case of one hostile band much smaller and less formidable than Victoria's band) or the extermination of the hostiles or the dispersion of the remnant of the band into smaller bands of guerillas, have we not here all the elements that are necessary to make a state of Indian warfare?

DISTINCTION BETWEEN TRIBE AND NATION.

Three different grades or classes of organization among Indians seem to be recognized by the statute—the band, the tribe, and the nation. The meaning of these terms must be derived from usage. Fortunately, we have the

long-continued use of all of them in treaties, official documents, opinions of the courts, and historical writings.

A "nation" of Indians may comprise several tribes, and is sometimes a loose term employed to denote a group of allied tribes, or a group of tribes having racial affinity with one another, where such tribes are severally independent and where no national organization exists; as in the case of the Apache Nation, the Sioux Nation. There is not and never was any central authority or organization whatever among the various tribes or bands of Sioux; so far as history records there never was any attempt at such organization on the part of the Apaches, the various tribes and bands being absolutely independent and autonomous in all respects. On the other hand, the term "nation" is also used to designate those political organizations of Indians which are farthest advanced in civilization and have the idea of civil government most fully developed; among these are the Creek Nation, the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation; these, with the Seminoles, are also frequently described as "the five civilized tribes," the terms tribe and nation being used here, as elsewhere, interchangeably by authoritative writers on the subject of Indian history. (Vide Census, 1890, volume relating to Indians, p. 25.)

There can be no hard and fast line drawn between a "nation" of Indians and a "tribe." The two words, when not used synonomously, convey so nearly the same meaning, and are so often used interchangeably as applied to the same divisions of Indians, that it is difficult to

distinguish between them in any degree. Where a distinction is intended it may be said that the tribe is usually smaller in numbers, though not always; the Comanche tribe or the Navajo tribe could muster thousands of warriors, while some of the so-called nations are much smaller. As compared with some of the bodies of Indians which are usually accorded the title of "nation," the tribe possesses a lower degree of civilization; its organization is not so complete, or is of a more primitive order, and it is more likely to be nomadic in character and to have no permanent home or seat of government.

The number of tribes of Indians in the United States is, and has been, very great in proportion to the total Indian population. The Indian population has ranged, according to various estimates and censuses, from 248,000 (the present enumeration) to 471,000, an estimate made by Jedediah Morse in 1822. Competent modern opinion holds that, contrary to the view once commonly accepted, the aborigines have increased in numbers rather than diminished; and that the total number within the present limits of the United States has never been greater than it is to-day. The number of distinct tribes and bands which have been recognized by treaty is very great. Prior to the year 1871, when Congress abolished the practice of making treaties with Indian tribes, 666 treaties had been negotiated (*Marks et al.* v. *The United States*, 161 U. S., 297). Many of these were with the same bands or tribes; but, on the other hand, there were many with whom no treaties were ever made; witness the various tribes of Apaches, the Mission Indians and other tribes in California, the different pueblos of New

Mexico. Many of the tribes once treated with have become extinct or merged with the white population, some new tribes and bands have arisen, and many have become known which were not known to the earlier writers and authorities. The report of Jedediah Morse in 1822 enumerated 230 tribes, not including, of course, many now within the limits of the United States; the census of 1890 gives 280 tribes (Census Report 1890, volume relating to Indians, p. 35). This increase of numbers, when we consider the great number of extinct tribes (21 stocks or linguistic families having completely disappeared: Census Report, p. 35), argues the constant formation of new tribes; although the tendency in this direction must have been greatly checked by the pressure of white supremacy and the collection of Indians upon reservations, where in many instances tribal distinctions were ignored. These new tribes may originate from factions divided and separated from the parent stock, or from the gathering of Indians from different tribes under a great leader for a common purpose, as in the case of Sitting Bull in 1876, who would undoubtedly have formed a distinct and permanent tribe in Montana from the numbers who flocked to his standard had not the strong arm of the Government been exerted to break up his band and drive its chief into exile.

DISTINCTION BETWEEN TRIBE AND BAND.

If we pursue further the distinctions which we have assumed to exist between nation and tribe and tribe and band, we find that the band is an aggregation of Indians

in many cases differing in no respect from a tribe, as in the case of the Ogallala band or tribe of Sioux. In other cases it is smaller and less prominent, or less ancient in its origin than most tribes, although still differing in no respects from other tribes. We conceive that a band, within the intent of the statute, may be an Indian organization the members of which came originally from different tribes, as in Victoria's band; or it may form a part of a single tribe which has been separated from the rest of the tribe by mutual consent or by the act of a superior power, or which has, under the leadership of a chief, broken away from the parent tribe and refused longer to owe it allegiance, as Dull Knife's band in the case of Conners, No. 279, which is to be considered with this case. All these methods of forming tribes have been recognized, and it is probable that the beginning of Victoria's band and Dull Knife's band differ in no respect from that of all tribes which are not of patriarchal origin. An instance of the formation of a tribe after one of the methods named above is found in the case of Joseph's band of Nez Perce Indians, which refused to join with the main portion of the tribe in the treaty of 1863 with the United States and remained thereafter a separate band or tribe, recognized throughout as such by the United States and subsequently becoming hostile in the Nez Perce war of 1877, during which the original Nez Perce tribe was not only in amity with the United States but actually allied with the Government against their former friends. *Wolverton* v. *The United States et al.* (29 C. Cls. R., 107.)

In the case of *Herring* v. *The United States and Ute Indians* (32 C. Cls. R., 536) the court has said:

> A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief.
>
> *The different divisions of Indians have not usually originated from the conventional mode which organizes white persons into political communities, but have originated as a condition in fact, and when so existing they are recognized by the laws and treaties as a separate entity and held responsible as such.*

SIZE OF VICTORIA'S BAND.

It may be argued that Victoria's band and Dull Knife's band were not sufficiently important in point of numbers and fighting ability to carry on a war against the United States; and that, therefore, they should not be recognized as independent hostile bands; but if even a cursory examination be made of the history of various Indian tribes and bands which have been recognized as capable of carrying on war and of making peace with the United States from the beginning of our Government down to the present time, it will be seen that this objection is without weight.

It will be admitted that every independent tribe of Indians, whether recognized by treaty or not, comes within the provisions of the act of March 3, 1891.

Ten distinct treaties, ranging in point of time from 1795 to 1867, have been made with the Wea tribe, which is now located in the State of Kansas; and the Supreme Court has recognized the validity of these treaties and the incapacity of the State of Kansas to exercise jurisdiction over individuals of the tribe (*The Kansas Indians*, 5 Wall., 737, 741). There were confederated with them at different times the Peorias, the Kaskaskias, and the Piankeshaws, treaties having been made with all these tribes. Yet in 1872 the total population of all the tribes named, including the Weas, was only 160; and at the time of their confederation under the treaty of 1854 they numbered only 259. (Report Secretary Interior, 1872, p. 426.)

With the Wyandotte Indians the United States negotiated nineteen treaties, from 1785 to 1867. Seven of these, ranging in date from 1818 to 1855, were with the Wyandottes alone; in the others they were joined with other tribes. The Wyandottes numbered in 1872, 222 souls, and in 1862, 435 (ibid).

A treaty was made in 1853 with the Cow Creek band of Umpqua Indians in Oregon. The exact number of this band is not known, but it was very small.

The Quapaws, with whom treaties were made in 1818, 1824, 1833, and 1867, numbered in 1872 about 240 souls. (Report Secretary Interior, 1872, p. 425.)

With the Rogue River tribe of Indians the United States made a treaty in 1853 and again in 1854. This tribe was the judgment debtor and appellee in the case of *Valk* v. *The United States and Rogue River Indians*

(168 U. S., 703), in which this court affirmed the judgment of the Court of Claims, dismissing the petition on the ground that the Rogue River tribe was not in amity with the United States at the date of the depredation. This tribe consisted at the date of the treaty of 396 souls. (Report Secretary Interior, 1854, p. 502.)

The Otoes and Missourias, with whom numerous treaties were made from 1817 to 1854, numbered in 1872 only 464. (Report Secretary Interior, 1872, p. 417.)

The Bannock Indians and the Piute or Snake Indians who were associated with them numbered in 1872, 521 and 516, respectively (Report Secretary Interior, 1872, p. 439); and in the case of *Marks et al.* v. *United States et al.* (161 U. S., 297) this court has held that the tribes named were not in amity with the United States in 1878.

According to the census of 1890 "the Palaikaihan stock [linguistic family], Pitt River tribe, Round Valley Reservation, Cal., consists of a *number of small tribes of California Indians, numbering in all only 581.*"

Illustrations similar to those cited above might be multiplied indefinitely, but enough have been given to show that the policy of the Government from the beginning has been to ignore the relative size or numerical strength of the tribes or bands of Indians which appear to be, and in fact were, independent bands.

Even before the establishment of the present form of government in the United States it was the practice, as is well known, to make treaties with the Indian tribes regardless of their size. In *Cherokee Nation* v. *Georgia*

(5 Peters, 125) Chief Justice Marshall refers to the Catawbas, with whom, he says, we have many ancient treaties, but who consist of only 80 or 100 polls.

The findings of fact in Montoya's case show that at about the time of the depredation or a little later Victoria's band contained from 200 to 250 Indians from the Mescalero tribe alone. He had also, as the findings further show, an indefinite number from the Warm Springs Agency, and at one time had with him 400 Chiricahua Indians. The court says further:

> During all the period of hostilities, as aforesaid, Victoria had under him a minority of the Chiricahua tribe of Apache Indians. At his solicitation he was reenforced from time to time during said period by a minority of the Indians from the Mescalero and Southern Apache tribe; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found. (Rec., 4.)

The statement in the appellant's brief that the number of Victoria's band varied from 13 to 250 is evidently based on the statement in the record that in June, 1879, Victoria, with 13 men, came into the Mescalero Reservation, which he left in July, taking with him not only the 13 men whom he had brought but all the southern Apaches on the reservation. This visit of Victoria to the Mescaleros bears every indication of having been for the purpose of stirring them up to hostility, and there is absolutely no foundation for the supposition that the 13 warriors who accompanied him composed his entire band, or were any more than a

bodyguard, to insure his safety from the reservation authorities.

In Conner's case the findings show that 320 Indians broke away from the reservation, to which they had been removed by authority of the Government, on September 9, 1878; the band under Dull Knife, at the time of the surrender, consisting of 148 souls, 49 of whom were men.

The war with Dull Knife's band is included in a list of about 40 important Indian wars of the century in the report of Indians taxed and untaxed of the Eleventh Census (p. 637).

These figures show that either of the bands whose status is under consideration was stronger numerically than many tribes and bands with which the Government has had treaty relations at various times extending over a long period of years; and stronger than some tribes, at least, which this court has decided to have been in relations of belligerency with the United States.

There can, therefore, be no argument against the recognition of these bands based upon their size.

THE SO-CALLED APACHE NATION.

That Victoria's band was similar in all essential respects to the other bands and tribes of Apache Indians is apparent to one who has carefully examined the history and relations of the Indians who were called by that name.

It can not be too strongly urged that a wholly false premise, leading to an utterly erroneous conclusion, would be relied upon if the court should accept any conception

of the Apache Indians as one tribe or nation, using the latter term in the political sense. The name is one indicating racial, rather than political, affinity; and the various tribes and bands of Apaches have always been independent in every respect of each other and often at war among themselves.

The Report of the Bureau of Ethnology for 1885–86, which is an exhaustive analysis of the racial relations of the American Indians, based on linguistic distinctions, uses the term "Apache" as descriptive of one branch of the southern group of tribes belonging to the Athapaskan family, the same group including also the Lipan Indians of Texas (now in the Indian Territory) and the Navajoes of New Mexico and Utah. The total number given as belonging to the southern group of the Athapaskan family is 23,409. Of this number the Navajoes alone numbered 17,208 and the Lipans 15, leaving *but 6,186 Apaches all told*. These were scattered over all New Mexico and Arizona, and one band (the Na-ish-a) in Texas. Aside from the Lipans and the Navajoes the principal tribes of this southern group were 14, as follows:

Arivaipa, Chiricahua, Coyotero, Faraone, Gileno, Jicarilla, Llanero, Mescalero, Mimbreno, Mogollon, Naisha, Pinal, Coyotero, Tchikun, and Tchishi. (Report Bureau of Ethnology, 1885—86, p. 55.)

It is to be noted that these are only the *principal* tribes, and that the report does not pretend to name all tribes and bands; and that this report was made in 1885, some years after the defeat and annihilation of Victoria's band by the United States army.

In the early stages of the litigation concerning Indian depredation claims this subject was involved in some confusion owing to the fact that treaties had been made purporting to be with the Apache Indians as a whole. A treaty was made with the "Apache Nation" of Indians in July, 1852 (10 Stat. L., 979), with the "chiefs and headmen of the Comanche, Kiowa, and Apache tribes or nations of Indians" in July, 1853 (10 Stat. L., 1013); one with the "Apache, Cheyenne, and Arapahoe tribes of Indians" in October, 1865 (14 Stat. L., 713); and one in October, 1867, with the "Kiowa, Comanche, and Apache tribes of Indians" (15 Stat. L., 589). The three latter treaties, however, were negotiated in Kansas, from 500 to 800 miles from the scene of operations of Victoria's band and more than a thousand miles from the home in Arizona of the majority of the Apaches; the only Apache Indians concerned in them were a small band known as the "Na-ish-a" band, which numbered about 500 at the time when the treaties were made, and 326 in 1885 (Report Bureau of Ethnology, 1885–86, p. 56; report on Indian tribes taxed and untaxed, Eleventh Census, p. 538). This small band was wholly separate from all other Apache Indians, and was so distinct in a political capacity that it was incorporated first with the Kiowas and Comanches by the treaty of 1853, then transferred to the Cheyennes and Arapahoes by the treaty of 1865, and finally returned to its association with the Kiowas and Comanches by the treaty of 1867. These facts appear in the reports accompanying the drafts of the treaties.

The fact that this small Na-ish-a band is described in a

treaty as "the Apache Nation" shows the loose use of the term and the imperfect knowledge of the situation which led to it. The same defect is apparent in the treaty of July, 1852, which purports to be with the Apache Nation alone; it is signed by only six chiefs or headmen, who could by no possibility have represented more than the same number of bands of Apaches; and when the situation became better known the absurdity of the treaty was so apparent that it has not been recognized as binding the various Apache tribes, the Commissioner of Indian Affairs having stated repeatedly that different tribes of Apaches were not in treaty relations with the United States; and in the Revision of Treaties with Indian Tribes, made in connection with the revision of the statutes in 1873, this treaty was omitted altogether.

The loose and inaccurate use of such expressions in treaties, and imperfect knowledge of the tribal relations of the Indians of the Far West and Southwest in the early days, have led to the impression that the Apaches constituted one political organization similar to that of the Navajoes or to the various bodies of the Five Civilized Nations. A more erroneous view could not be conceived. There is not and never was any sort of political connection between the different tribes and bands of Apaches. They have frequently been at war with one another. There is not and never was any central organization or any great chief recognized by all, or even by any two or three bands or tribes of Apaches. The very name "Apache" is used by those who are familiar with the relations of the Indians thus designated merely as a descriptive term applied to a group of tribes having

many characteristics in common, but who are wholly independent of one another as regards government and everything that pertains to tribal autonomy.

The Court of Claims, which has heard and determined more than 2,000 of these Indian depredation cases, during the process of which litigation the question of the amity and the political relations of the various tribes throughout the United States has been examined from every point of view and in the light of a vast quantity of documentary evidence, said in the case of *Dobbs* v. *The United States and Apache Indians* (33 C. Cls. R., 308, 314):

> As the litigation of these Indian depredation cases has gone on, the fact has become more and more apparent that the Southwestern tribes during the last fifty years have had no defined or definable nationality or tribal entity, and that they were little more than robber bands dwelling in the fastnesses of the mountains or moving like Arabs on the arid plains. The Apaches, for illustration, supposed to be one people, were a unity only in race. In fact, they consisted of bands having different habitats, with no common purpose, no semblance of government, tribal or confederate, occasionally cooperating in war against a common enemy, as civilized nations do, but being in their several entities each as distinct as if the others did not exist. They had no "long house," like the Iroquois, in which the representatives of the Six Nations met to confer concerning the common welfare, and no several organizations. These bands, too, were each of them paltry in numbers, so paltry that if they had appeared as rioters in one of our great cities the local police would have overcome them and restored

order without the aid of the military in a single day. Their strength was not in numbers or organization, but in their incomparable bravery, hardihood, and military genius—a genius which, until General Crook made friends with a portion of them and organized Apache scouts to follow and fight Apache Indians, had successfully resisted and eluded the military forces of the United States and Mexico. More than a hundred years ago the Apaches required the presence of 4,000 Spanish dragoons to protect the Mexican frontier.

The condition so clearly set forth in this opinion must be taken into consideration in interpreting the statute which refers to a "band" of Apache Indians.

DIFFICULTY OF DISCRIMINATING BETWEEN BAND AND TRIBE AND TRIBE AND NATION.

It must be apparent that the rough distinctions which were tentatively drawn between bands and tribes and between tribes and nations are by no means adhered to in the discussion and recognition of groups of Indians either by historians or by contemporaries. They have not been observed by the Government in its dealings with the Indians. Even in the making of treaties, where every solemnity is observed and where the greatest attention is paid to form, we find much confusion in this respect. Treaties have been made with bodies of Indians as "nations," and at a later date other treaties have been made with the same bodies of Indians as "tribes." Similarly, distinct tribes of Indians are sometimes called "bands" in treaties, the very act of making which show that the "bands," were

considered as wholly independent of other connection in a political sense, and that the Senate and the Executive used the word "band" to indicate a body possessed of the same qualified sovereignty and entitled to the same recognition in a political capacity as the "tribes" or "nations" with whom other treaties were made. Such treaties have been made with the "Eastern Band of the Bannocks and Shoshones," the "Blackfoot Band of Sioux," the "Bois-Forte Band of Chippewas," the "Calapooia" and "confederated bands of Willamette Valley," the "Pillager Band of Chippewas," various bands of Sioux Indians, and many others, the list being extended in the brief for the appellants (pp. 8–16).

The conditions which contribute to the confusion resultant upon the recognition of the various bodies of Indians as semiindependent states are well set forth by Bancroft in the passage quoted in the opinion of the court, which is printed as a part of the record in the Montoya case:

> But the great peculiarity of the Indians consisted in the want of political connection. A single band often constituted a government; a collection of 10 or 20 wigwams might be an independent state. The greatest chief in the country could not muster more than 700 or 800 fighting men. The dialect of each government seemed a language by itself.
>
> Their government rested on opinion and usage, and the motives to the usage were never embodied in language; they gained utterance only in the fact, and power only from opinion. No ancient legislator believed that human society could be maintained with so little artifice. Unconscious of political

> principles, they remained under the influence of instincts. Their form of government grew out of their contentions and their wants, and were therefore everywhere nearly the same. Without a code of laws, without a distinct recognition of success in the magistracy by inheritance or election, government was conducted harmoniously by the influence of native genius, virtue, and experience. * * * The Indian chief has no crown or scepter or guard. No outward symbols of supremacy or means of giving validity to his decrees. The bounds of his authority flowed with the current of opinion in the tribe; he is not so much obeyed as followed with the alacrity of free volition and therefore the extent of his power depends on his personal character. There have been chiefs whose commanding genius could so overawe and sway the common mind as to gain for a season an almost absolute rule, while others had little authority, and if they used menaces were abandoned.

In the last analysis the distinctions between band and tribe and tribe and nation vanish; and the common-sense view of the statute is, not to make the restriction clearly intended by its terms a matter of hair-splitting inquiry as to the political capacity of the hostile band of Indians, but to consider that by the inclusion of the term band Congress meant not to enter into the subtle refinements of international law, but to remove all possibility of doubt and to make clear provision, by the use of words which are easily understood and not susceptible of ambiguous interpretation, for recovery for depredations committed by individuals belonging to organizations which were at peace with the United States, and by the same

clear terms to enact that whenever any organized and armed Indian opposition to the United States authority and forces is in the field, persisting for a period of years under the same organization and the same leaders in the policy of war against the United States, the incidental depredations and foraging raids made by such organization or by its members are not depredations for which the United States is responsible to its citizens; in conformity to the universal rule governing responsibility for private property destroyed by the enemy in time of war.

THE ACT OF MARCH 3, 1891, DRAWN WITH REFFERENCE TO WARS WITH BANDS OF INDIANS.

That this was the purpose of Congress is made more certain by the fact that the act was apparently drawn with especial reference to the numerous wars which had been waged from time to time with bands of Indians similar to that of Victoria.

In the appellant's brief reference is made to the act of 1834, in which the same requirement of amity appears, but in which the only word used to describe the Indian body is the word "tribe." It is argued that the words "tribe, band, or nation" in the act of March 3, 1891, meant no more than the word "tribe" in the act of 1834. This, as an abstract proposition, may be granted; for it can not be doubted that if the court were charged with the duty of ascertaining whether a tribe to which depredators belonged was in amity with the United States, it would look to the actual independent political body, under whatever name, and its status with reference to amity would determine the jurisdiction of the court.

But, if there were any doubt upon this point, the deliberate action of Congress in 1891 would resolve that doubt in favor of the decision made by the Court of Claims. Between the date of the first and the last acts the policy of the Government with reference to Indian tribes had been radically changed. In 1871 Congress had prohibited the making of further treaties. It had become known to the executive branch of the Government and to Congress that the Indians of the Southwest did not possess a national government; that they were divided up into numerous small but independent bands, which severally had all the attributes of sovereignty ever possessed by any Indian tribe, but with whom it was no longer considered necessary to deal by treaty.

Again, Congress was informed that during the years intervening between 1834 and 1891, and more especially during the decade just preceding the latter date, there had been numerous Indian wars with bands of Indians which had never been treated with formally and whose recognition as independent powers had been practically forced upon the field of battle. The Blackhawk war from 1865 to 1867, the war with Dull Knife's band of Northern Cheyennes in 1878, with Sitting Bull's band of Sioux in 1876 and 1877—made memorable by the loss of the gallant Custer and his men—the war with Victoria's band in 1877–1880, and, still more recently, the noted campaign against the Apache chief Geronimo in 1885 and 1886, were all fresh in the recollection of everyone who had to deal with Indian affairs. It was in the light of knowledge of these facts that the act of March 3, 1891, was framed.

Turning now to the istory of the act itself we find that as it was passed by the House it required only that the depredation which was the subject of complaint should have been committed by Indians and that the court should find, if possible, the tribe of Indians by whom the wrong was committed and that the judgments should be charged against the annuities or permanent funds belonging to such tribe. (House bill No. 8150, Fifty-first Congress, second session; House report No. 1079, Fifty-first Congress, first session.)

In the Senate a substitute for this bill was adopted in which the requirement of amity was inserted, making the statute conform with all previous legislation on this subject; and the jurisdictional clause of the statute was framed as it now exists. By this provision, afterward enacted into law, the jurisdiction of the court was limited to cases where the political body to which the depredators belonged was in amity with the United States; but instead of using the single term "tribe" which had been used before, the more comprehensive description "band, tribe, or nation" was inserted. (Senate report 1886, Fifty-first Congress, second session.)

The appellees accept the conclusion that the word "band" has a similar meaning to the words "tribe" and "nation;" but to be similar is not to be identical. The association of terms which implies similarity precludes the possibility of identity. The presumption against redundancy in the statute is as strong as the presumption of similarity of meaning from the association of terms. The use of the word "band" indicates a knowledge on the part of Congress of the possible or actual existence of

an independent political organization among Indians which was not fully described by the word "tribe," though in all essential respects resembling a tribe. The only reasonable explanation of the insertion of the additional words is that Congress, with the history and character of the recent Indian wars fresh in memory, used the comprehensive terms of description, out of abundance of caution, to exclude any possible doubt as to the bodies of Indians whose amity was to be determined.

INDEPENDENCE THE TEST.

What, then, is the criterion by which we may determine whether an organization of Indians is capable of sustaining relations of belligerency? If, as we have seen, numerical strength is not the determining factor; if we find that bodies of Indians are recognized as States, who have no government except the will of a single chief, and others who have a government nearly as complex as our own; if in some instances this Indian State is fixed in locality while in others it is nomadic, having not even a village that is permanent; if all these organizations alike fail of having all the attributes of sovereignty, even the fundamental right of dominion over the soil being, to all alike, denied them by the United States; if none of these tests, nor any others that go to distinguish a civilized nation from a horde of savages, can be applied in the case of an Indian State, what is the standard by which the court can distinguish a responsible band or tribe of Indians from a mere body of irresponsible robbers and outlaws?

In the opinion of counsel for the appellees the test to be applied is that of independence. By this is meant not absolute independence, which no Indian State has, or ever had after the advent of the Caucasian race, but independence of other Indian authority. However a tribe or band may have originated, whatever the purpose of its members in confederating, however large or small the band may be, the moment its separation from another tribe or tribes assumed a character of permanency, the moment that it ceased to owe or to acknowledge allegiance to any other authority, the moment the tribe or nation of which it had formerly been a part, or to which its members had formerly belonged, ceased to exercise or to claim control over it, and expressly or tacitly disavowed responsibility for its acts, in that moment it became a de facto band (or tribe, if you will, since it is by the same means that tribes arise), and became a living entity, responsible for its own acts, and, under the statute, for the unlawful acts of its individual members.

The attitude of the Government from the beginning has been to recognize, under whatever name, the de facto organization which showed itself capable of acting for itself either in making war or in making a treaty of peace. To quote from the opinion of the Court of Claims in this case:

> The main purpose in treating with the Indians was to secure and maintain peace with them and thereby open up the country to advancing civilization; and whenever that could be obtained, treaties appear to have been made with them without reference to their particular form of government or

tribal organization. The chief executive or responsible head of the organization, whatever its character, was the one whose signature was sought in making treaties.

The cases cited in the brief for the appellant (pp. 33–35) hold that the courts must recognize bands, tribes, or nations as such when treaties have been made with them, the action of the political department of the Government binding the courts. It does not follow, however, that where no treaty has been made the court may not determine the status of the band or tribe from other factors. Indeed, counsel for the appellant would be the last to contend that recognition by a treaty is necessary to establish the suable character of an Indian tribe under the act of March 3, 1891, inasmuch as many similar claims are against Indian tribes with whom no treaty has ever been negotiated. The distinction is recognized in the opinion in the *Graham Case* (30 C. Cls. R., 333), quoted with approval by the appellant (brief, p. 35).

It is not to be lost sight of in considering this case that it arose in 1880, some years after the passage of the act of March 3, 1871, which forbade the making of further treaties with Indian tribes, while it recognized the validity of those which had already been made (16 Stat. L., 544 and 566). This does not affect the question of amity. The leading case on that question (*Marks* v. *The United States et al.*, 161 U. S., 297) involved a depredation committed in 1878. But since the date of the statute, of course, no band or tribe of Indians has been

recognized by treaty, and other factors must determine their status. Dull Knife's band had, prior to that time, followed the fortunes of the other bands of the Northern Cheyenne tribe. Victoria's band, while it was known as a separate band as early as the year 1868 (Report Secretary Interior 1868, p. 635), did not attain prominence until a later date. Hence neither of these bands could have been treated with formally.

In dealing with this question the Court of Claims, in the case of *Dobbs* v. *The United States and the Apache Indians* (33 C. Cls. R., 308), said, Chief Justice Nott delivering the opinion:

> In dealing with the question of the amity of such a tribe as a band of Apaches the court has been more and more compelled to fall back upon the purpose of the earlier statutes, which created a liability and gave to these claimants their right of action. That purpose, as has been said before, was to keep the peace—to prevent Indian warfare upon the frontiers. * * * The practical question then is, Who were the Indians whose amity was to be maintained? Who were the Indians so affiliated with the depredators in fact that the depredators might reasonably be regarded as a part of them, and they be regarded as a body whose amity it was desirable to maintain?

In another case in the Court of Claims, in a decision which has been acquiesced in without question by both claimants and defendants, and in a case where the amity of a small band of Apache Indians, who were at that time living along the banks of the Mimbres Creek in

New Mexico, and hence known as Mimbres Apaches, Peelle, J., delivering the opinion of the court, said:

> The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted and to treat with them accordingly.
>
> So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government, whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.
>
> Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands as made by the Indians themselves, whether such tribes and bands be named by reason of their geographical location or otherwise.
>
> If a number of Indians, with a chief or headman, make their home in the vicinity of the Mimbres Rivulet, in New Mexico, or on the Arivaipa Creek, in Arizona, as a tribe or band, as in the case at bar, that is sufficient to identify them in the absence of any other name, and particularly when they are a part of a common family whose general or family name is known. (*Tully* v. *United States et al.*, 32 C. Cls. R., p. 1.)

THE CHARACTER OF VICTORIA'S BAND.

In the brief of the appellant there seems to be a curious assumption that the court will accept a view which is not sustained by the record, if it be but asserted often enough in the brief. From the expression on the outside of the cover, "Victoria's and other like marauding

bands," to the "disorganized and robber band without national character," on pages 32 and 33, the brief is filled with characterizations of Victoria's band as "robbers and murderers," "a gang of thieves," "a band of cutthroats," "a depredating band of renegades," et cetera.

It is needless to say that these expressions are not sustained by the record. The Court of Claims says expressly in its opinion:

> It was not an assembly or organization of people having in view plunder and pillage for a day or a week and then of separating and returning to their several homes * * * but it was a band separate and distinct in its organization * * * and having confederated themselves together under the leadership of Victoria as a band for the common purpose of hostilities and war. (Record, p. 11.)

And again—

> The confederation of Indians from the various tribes or bands under the leadership of Victoria, as set forth in the findings, *was not for the purpose of robbery and theft, but was for the purpose of aiding Victoria and his Chiricahua followers in resisting the military authorities in removing them to the San Carlos Reservation.* (Record, p. 7.)

If the history of Victoria's band originated in the attempt of the United States forcibly to remove the Chiricahua Indians from the home where they and their ancestors had been born, and from the land which long years of occupancy and enjoyment had caused them to regard as their own; if, as the necessary consequence of their rebellion against this summary action by the authorities of a race of people whom they, with at least

some show of reason, regarded as their oppressors, a war began in which they persisted, although fighting against overwhelming odds, even to the point of their annihilation—shall such a struggle be contemptuously characterized as that of a "band of cutthroats?" Shall the purpose which actuated this heroic band, battling for their homes, be scornfully dismissed as that of mere "robbers and murderers?" It must not be forgotten that this combat has been described to us only by the pens of the conquering race. If the Apache Indians had a Homer, who can doubt that the prowess and achievements of Victoria would be celebrated in poetry and song throughout a thousand years? We can not justify Victoria's method of warfare; but it was the Indian method, and we can not say because it was barbarous it was not war. It has ever been the custom of the victor to belittle and despise the purpose and motives of the vanquished, and the insolence of the conqueror often goes very far in the contemptuous characterization of his fallen foes; but in after years, when time has softened the injury inflicted by that foe and when man's passions have cooled, history can afford to do justice to the loser, even though he has had no advocate of his own race and his story must be told by the unsympathetic pen of his former enemy.

The statement that the existence of Victoria's band dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos Reservation is not strictly accurate. That was undoubtedly the date when it first engaged, alone and unsupported by other Apaches, in war with the United States; but Victoria's band was in existence, and was recognized by the United States as a

band, as early as 1868. (Report Secretary Interior, 1868, p. 635.)

Another wholly incorrect conception of the nature of the band would be derived from the acceptance of the following statement in the brief for the appellant: "They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victoria they returned to their reservation and resumed relations with the Mescalero, or Chiricahua, or other tribe to which they belonged." (Brief, p. 32.)

There is nothing whatever in the record to sustain or justify this statement. However different from ours the Indian's idea of tactics may be, however frequently they may have scattered for the purpose of eluding their foe, to gather again at some other point, there is nothing to show that any Indian warrior who once joined his fortunes with those of Victoria's band ever turned back.

Another erroneous view is that Victoria's band was made up of outlaws from other bands or tribes. It is of course true that he received accessions from other bands of Apaches—from the Mescaleros and from the so-called Southern Apaches—but this did not give character to the band. This had been in existence for years before that time, and Victoria had been its chief. These accessions came to him when in the full tide of success, after he had maintained the war with his own band for several years.

Subject to such considerations as necessarily arise from the act of 1871, forbidding the making of treaties with

Indian tribes in the future, and the fact that Victoria's band first came into prominent notice at a time subsequent to that date, the appellees contend that Victoria's band satisfies even the definition of the word "band" as given by the appellant on page 18 of his brief, to wit: "An organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government."

Victoria's band was an organization of like character to a nation or tribe of Indians in that it was a body of Indians recognizing a common chief, united in a common purpose, dwelling together and acting as a unit under the control and direction of the chief. It was as capable of making treaties and holding tribal funds as many another band of Indians with whom the United States has made such treaties, and there is nothing in the history of the dealings of the United States with Indian tribes to indicate that, had the opportunity arisen for making peace with Victoria's band, and had the making of treaties not been prohibited by statute before that time, a treaty of peace would not have been made with the band and the Indians composing it assigned to some one of the reservations set apart for Indians, or a separate reservation established for their occupancy, and annuities settled upon them to prevent a recurrence of their outbreaks against the white inhabitants of the country. This course was pursued again and again with Indians who had been at war with the United States and might have been pursued, even without the formality

of a treaty, in the case of Victoria, had his grievance against the United States been less acute or had he shown any disposition to forget the injuries that he had received and to adjust his differences with the authorities of the United States on a peaceful basis. To pass to the third division of the definition, Victoria's band was entitled to the recognition of belligerent rights, and actually enjoyed such belligerent rights, as did the Indians belonging to other bands who made war against the United States in the same fashion and under similar circumstances. Finally, Victoria's band was recognized by the political department of the Government, not, to be sure, by the negotiation of a treaty (for reasons already recited), but by that branch of the Government having supervision of Indian affairs, and by the action of the executive in prosecuting against him a long and vigorous war, in which he was accorded the rights of a belligerent and treated with as such when opportunity arose.

A QUESTION OF FACT.

From the arguments that have been adduced it must be apparent to the court that the question in this case is largely a question of fact. Was Victoria's band, as a matter of fact, an independent political entity, similar to other Indian tribes, possessing the power to make war as Indian tribes possess that power, entitled to belligerent rights; and had it been so recognized? The answer to these questions, as given by the Court of Claims, which in the trial and adjudication of more than 2,000 similar cases against hundreds of different tribes and bands has

become thoroughly familiar with the subject, is found in the findings of fact.

> From the reports referred to [reports of the Commissioner of Indian Affairs and the Secretary of the Interior, civil officers of the administration] in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer in 1878 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed, as aforesaid.
>
> * * * * *
>
> Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band known as Victoria's band of Apache Indians, which *was at and long before that time known and recognized as a band separate and distinct in its organization and action* from the several tribes then at peace to which its members had formerly belonged.

SHOULD THE MESCALEROS BE HELD RESPONSIBLE?

The suits brought under the act of March 3, 1891, are suits against Indian tribes. The Indian tribe is the primary judgment debtor in every case in which judgment is rendered for the claimant, except where the Indians can not be identified. By the sixth section of the statute it is provided that payment of the judgment shall be made, first, from annuities due the tribe; second, from

any other funds due the tribe from the United States arising from the sale of their lands or otherwise, and third, from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence, and education. In any case where no funds are available and where payment of the judgment must therefore be made from the Treasury of the United States, it is provided that the payment shall remain a charge against the tribe, to be deducted from any annuity, fund, or appropriation which may hereafter become available.

It follows that in the case of a depredation committed by one of these hostile bands, if we deny that the band is capable of maintaining hostility to the United States in the sense intended by the statute, payment for the depredations of its members must be made by the tribe or tribes to which they had originally belonged.

Taking this view of the case, the appellant argues that judgment should be rendered against the Mescalero Apache tribe. If the Indians committing the depredation belonged to the Mescalero Apache tribe, counsel says the tribe was in amity and therefore the judgment should be charged against that tribe. There is no reason, it is said, why the band's hostility should overcome the tribe's amity; why the temporary membership of Victoria's band should override the permanent membership of the Mescalero tribe. The answer to this is plain, assuming that the court shall agree with the opinion of the Court of Claims that Victoria's band was an independent band. The Mescalero Apache who left his reservation without the knowledge or contrary to the

wishes of the tribe and joined his fortunes with another independent band, having no relations with the Mescaleros, and at war with the United States, acted in a manner which was inconsistent with the longer retention of his membership in the Mescalero tribe and became ipso facto a member of the hostile band. For all purposes, he was no longer a Mescalero, but was a member of the band of which Victoria was chief. If in the expeditions which were from time to time made by Victoria's Indians for the double purpose of supplying the band with necessary provisions and supplies and of making effective their style of warfare, the particular raid which was the subject of this suit in the Court of Claims happened to have been committed by a member of the band who had formerly belonged to the Mescalero tribe, that circumstance was simply fortuitous. The character of the depredation is to be taken wholly from the nature and status of the organization to which the individual depredator belonged at the moment of the commission of the act. It is as if a detachment of Boer soldiers operating in Natal were ordered to make a foraging raid, and in so doing an American or German officer who had cast in his lot with the people of the South African Republic should be concerned in the taking of property. Suppose, for the purpose of illustration, that an international agreement existed by which civilized nations accepted a liability for the acts of their citizens similar to that which is imposed upon Indian tribes by the United States. In that event the circumstances would be identical with those in the case at bar. Would it be seriously argued that the

United States or Germany, being in amity with the British Empire, would therefore be liable to respond in damages for the acts of these adventurers who had joined their fortunes with one of the belligerent powers? Of course the question answers itself.

The statement is made that the allegiance of the depredators to Victoria's band was temporary, while their allegiance to the Mescalero tribe was permanent. There is no warrant in the findings for this assertion, unless we deny the possibility of any transfer of allegiance. On the other hand, the opinion says that this "was not an assembly having in view * * * separating and returning to their several homes." (Rec., 11.)

Even if the transfer of allegiance were not complete; even if the membership of the band were temporary, it would still be true that the members of the band, while they continued in such relation and operated with the hostile band and under its protection, owed to it a temporary allegiance which determined for the time being their national character.

The general principal is that an alien, while domiciled in a country, owes to it a local and temporary allegiance, which continues during the period of his residence, in return for the protection which he receives.

Janis v. *The United States*, 32 C. Cls., 407.
Hugh Carlisle et al. v. *The United States*, 16 Wallace, 147–156.
Leghorn Seizures, 27 C. Cls. R., 214.

The Mescaleros were bound to restrain their own members, but they were not obliged to go to war with Victoria's band to reclaim former members of their

tribe who had joined that band. This would be altogether in excess of the obligations of neutrals.

The question of the independence and tribal character of Victoria's band does not depend upon the accession of these Mescaleros. It was not until some time in the spring of 1880 that any of the Mescalero Apaches were induced to join Victoria; and then it was only the long-continued successful opposition of the band to the United States troops which fired the hearts of the Mescalero braves and induced them to cast in their lot with the hostiles. Victoria's band was, as we have already seen, known as early as 1868, and was composed primarily of Chiricahua Apaches. As such it was, at least after the forced removal of the Chiricahuas from their old home to the San Carlos Reservation and Victoria's refusal to submit, a homogeneous, independent hostile band. It had received accessions in 1879 from certain unattached Indians which had previously belonged to the Southern Apaches but were at that time kept by the Government on the Mescalero Reservation. These, however, were not Mescaleros. It was but a comparatively short time after the Mescaleros joined the band in 1880 that it was finally defeated in Old Mexico and Victoria with most of his followers slain.

The question of the tribal relations of those Mescaleros who had joined Victoria's band is, therefore, not involved with the question of the actual constitution and independence of the band, which were established before any of the Mescaleros joined it.

To hold any other tribe responsible for the acts of the Indians associated with Victoria would be highly unjust.

The statute imposes at best an extraordinary liability upon Indian tribes. It does this without the consent of the tribes, by the exercise of the strong arm of the United States. The only justification for the rule is that the protection which it affords to the settler whose property is taken by roving bands of Indians may induce him to refrain from indiscriminate reprisals, and thus lessen the probability of the outbreak of Indian wars; and that by its effect upon the tribes it may induce them to restrain their young men and other lawless elements from the commission of depredations upon the whites, through fear of the tax upon their funds and annuities which would result from depredations. To this end, most of the treaties upon this subject provide that if the property be restored by the Indians in council, or the guilty individuals delivered up for punishment, no monetary indemnity may be required. If now, in a given class of cases, the circumstances are such that it is beyond the power of the tribe to affect the action of the individual, beyond their power to restore to the owner the property which is taken from him, and beyond their power to deliver up for punishment the wrongdoer, and if at the same time the body really responsible for the depredation is already at war with the United States, then the reason for the rule fails utterly; and when the reason for the rule ceases the rule ceases. In the case at bar it was no fault of the Mescaleros and through no negligence of theirs that the depredation was committed by those members of their tribe who had left them and joined Victoria's band. The United States had failed to protect itself and its citizens against the

incursions of Victoria's band. An armed force was in the field under his command; he was even allowed, with a small number of his followers, to visit the reservation and use the arts of persuasion for the purpose of recruiting his force under the very eyes of the authorities. The horses, sheep, and cattle taken from citizens were not carried to the camp of the Mescaleros. The Indians did not return, for, notwithstanding the assumption in the appellant's brief that the permanent allegiance of the Mescalero Indians was with their own tribe, and that their allegiance to Victoria's band was but temporary, there is nothing to show that they ever returned to their former allegiance. They were loyal to Victoria's cause and perished with him. It was beyond the power of the Mescaleros to restrain them from depredating, or to restore the property which they captured.

To hold the Mescalero tribe responsible would be to violate every principle of equity.

In the appellant's brief it is said that if the logically resulting converse of the decision of the Court of Claims in this case be considered it will result that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. This, however, does not follow; in fact, could not logically be held. If a tribe be hostile and there be a band theretofore belonging to that tribe which possesses or acquires sufficient independence and autonomous character to be held to be a separate entity capable of sustaining political relations with the United States different from, and even opposed to, those of a majority of the tribe as already constituted, the decision which

held this would necessarily carry with it a judgment not against the original tribe but against the band in amity.

The appellant contends (Brief, p. 29) that—

> The temporary purpose and varying constituency of such a band, as in the present case, renders it impossible to make it a party defendant. Where is Victoria's band to-day? Its existence was unlawful from the beginning, and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself.

Pointing out, in passing, the fact that it was not the varying constituency of Victoria's band which enables appellant to ask, "Where is Victoria's band to-day?" but the fact that the band was annihilated in battle with United States troops, we may acknowledge that the question of the proper party against whom judgment should be rendered is not without difficulty. It is not a question, however, which is peculiar to this case. It may be asked with equal pertinency in regard to many tribes which have been made parties and against whom judgment has been rendered without question and with a tacit acceptance of the United States as a responsible judgment debtor. With equal pertinency appellant might ask, Where is the Chiricahua tribe to-day? The court has rendered judgment against the Aravapai tribe of Apaches, against the Chiricahua Apaches, the Gila Apaches, the Jicarilla Apaches, the Mimbres Apaches, and the Pinal Apaches; yet not one of these tribes has to-day any independent tribal existence whatever. Under the concentration policy which was adopted between 1870 and 1880 and the application of which to the Chiricahuas

was the direct result of the rebellion of Victoria's band, all these Apaches have been forced together upon the San Carlos Reservation. Separately they have no property. The appropriations made by the United States for their support are made "for support and civilization of the Apache and other Indians in Arizona and New Mexico who have been or may be collected on reservations in Arizona and New Mexico." (30 Stat. L., 77, 585, 937.) Under this same appropriation is included all the revenue of the Mescalero Apaches, against whom appellant would have the court render judgment in this case. Their tribal name has been kept alive merely from the fact that the reservation upon which they lived, in common with other Apache Indians, was originally named for that tribe. They too have no property, have no separate appropriation for their support and maintenance, and have no tribal existence which is recognized by the political department of the Government. Other tribes against whom judgment has been rendered have disappeared wholly from the face of the earth. This is but another indication of the similarity of the conditions affecting the different bands and tribes of the Apaches and other Indians and of the anomalous conditions introduced into the adjudication of these cases by the enforcement upon the tribe of liability for acts of individuals committed many years ago.

In any event, no argument against the independent status of Victoria's band can be drawn from the fact that the band was annihilated in battle. A friendly tribe may become extinct as well as a hostile band. To contend that judgment may not be rendered in any case

where the band or tribe to which the depredators belonged has ceased to exist does not help the claimant in this case and would take away the remedy in many cases where the court now renders judgments which are paid out of the Treasury of the United States.

PRESUMPTIONS IN FAVOR OF THE APPELLEES' CONTENTION.

This is a statute in derogation of the principles both of the common law and the law of nations. By virtue of the power which Congress has to legislate in regard to Indian tribes, it makes them responsible for acts committed by individuals without the sanction and without the knowledge of the tribe. Such a statute is always strictly construed, and where a doubt exists it should be resolved against the extension of the terms of the act.

Again, it is a statute in derogation of the sovereignty of the United States, and as such it should be strictly construed. In another case appealed from the Court of Claims under this statute, Brewer, J., delivering the opinion of the court, said:

> In case of an award by the Court of Claims the United States become in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate. (*Leighton* v. *The United States*, 161 U. S., 291.)

On still another ground the presumption is in favor of the appellees' contention. The court said in the case of *Marks et al.* v. *The United States et al.* (161 U. S., p. 297):

> Again, as often affirmed in the decisions of this court, the Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit.

In *The Choctaw Nation* v. *The United States* (119 U. S., 1, 28) this court said:

> How much more should this just and beneficent principle be applied in the interpretation of a statute which is in derogation of the ordinary principles of law and in derogation of the rights of the Indian tribes, considered as semiindependent nations under the general principles of international law.

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Assistant Attorney-General.
LINCOLN B. SMITH,
Assistant Attorney.

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Supreme Court of the United States.

No. 44.—October Term, 1900.

Milton C. Conners, Jr., Appellant, vs. The United States et al. } On appeal from the Court of Claims.

[February 11, 1901.]

This was also, as in the last case, a claim for live stock taken and destroyed in October, 1878, by certain bands of the Cheyenne and Arapahoe Indians, the suit being against the United States and Dull Knife's and Little Wolf's bands of Northern Cheyennes and the Northern and Southern Cheyennes and Arapahoe Indians. Defendants disclaimed responsibility upon the ground that the depredation was committed by an independent band of Indians, not then in amity with the United States.

The Court of Claims made a finding of facts, the material article of which is set forth in the margin.*

Upon these findings of fact the court decided as a conclusion of law:

The bands of Dull Knife and Little Wolf, at the time when the depredation was committed, were independent bands of Indians within the intent and meaning of the Indian depredation act, 1891; and the tribe of

* *Finding of Facts.*

In May, 1877, 937 Northern Cheyennes, men, women and children, were removed from the Red Cloud reservation at Fort Robinson, in Nebraska, to the Southern Cheyenne and Arapahoe reservation at Fort Reno, in the Indian Territory. The Cheyennes went voluntarily, though reluctantly, relying in part upon representations made to them that the southern reservation would be a desirable home, and in part upon what they understood to be assurances that, if dissatisfied with it, they should be brought back. The body of Indians was composed of subdivisions of the Cheyenne tribe known as the bands of Dull Knife, Little Wolf, Wild Hog and Old Crow. These so-called bands had no autonomy, and had not been recognized either by the government or by the tribe as separate entities. They were natural segregations of civilized Indians, leading a nomadic life and living in groups in a widely extended habitat. The so-called chiefs were leaders or spokesmen, commonly called head men. The Indians so removed were about one-half of the entire tribe.

On the reservation at Fort Reno, the Cheyennes of Dull Knife's and Little Wolf's bands lived apart from other Indians on the reservation. They were dissatisfied, and made repeated applications to the government to be brought back to what they termed their native country in the Northwest. No notice being taken of their request, 320 of them broke away from the reservation on September 9,

Northern Cheyennes, the defendants herein, was not responsible for their acts of depredation, and the petition should be dismissed. (33 Ct. Clms. 317.)

Mr. Justice BROWN delivered the opinion of the Court.

The opinion of the Court of Claims sets forth with more fulness than the findings the details of one of the most melancholy of Indian tragedies—a shocking story of nearly a thousand of the Northern Cheyenne tribe removed from the Red Cloud reservation in Nebraska to the Southern Cheyenne and Arapahoe reservation, at Fort Reno in the Indian Territory; of the profound dissatisfaction of Dull Knife's and Little Wolf's bands, who lived apart from the other Indians on the reservation, and made repeated applications to the government to be returned to what they termed their native country in the Northwest; of no notice being taken of their request, when over three hundred of them broke away from the reservation; of a

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1878. The commanding officer at Fort Reno sent a military force in pursuit. "The officer in command was particularly instructed if he could induce the Indians to come back without resort to force to do so."

The Cheyennes were overtaken at a point 120 miles distant from Fort Reno. The officer in command summoned them to yield and return to the reservation. Little Wolf, as spokesman for the Cheyennes, replied in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon the Cheyennes, who returned the fire, and then fled and escaped. They made their way across Kansas and Nebraska, twice fighting United States troops and likewise a body of armed citizens who attacked them. In the northern part of Nebraska they were intercepted by other troops, and after some fighting they surrendered on the 3d of October, and were taken to Fort Robinson. Shortly before this surrender, Little Wolf with about half of the party had separated from Dull Knife, and he and his party were not included in the surrender. Old Crow and Wild Hog, with some of their bands, accompanied Dull Knife's party in this escape from the Indian Territory. The leading chief was Dull Knife, and the Indians, regarded as a military force, were under his command. The band at the time of the surrender consisted of 49 men, 51 women and 48 children.

Up to the time these Cheyennes were fired upon in the Indian Territory by the pursuing troops they had committed no atrocity and were in amity with the United States and desired to remain so. After they were fired upon, as before described, their flight was characterized by the usual characteristics of Indian warfare. During the period of this fighting—that is to say, between the 9th of September and the 3d of October, 1878—the Northern Cheyennes, both in the Indian Territory and on the northern reservations, were in amity with the United States.

On these specific facts the court finds the ultimate facts, that at the time when the depredation above set forth was committed the tribe of Northern Cheyenne Indians was in amity with the United States, with the exception of those who composed the bands of Dull Knife and Little Wolf, and that the bands of Dull Knife and Little Wolf were not in amity.

military force from Fort Reno sent in pursuit of them with particular instructions to induce the Indians to come back without resort to force, if possible; of their being overtaken one hundred and twenty miles from Fort Reno; of an order to return to the reservation and a reply in substance that they did not wish to make war, but that they would rather die than go back. The troops immediately fired upon them; they returned the fire, fled and escaped; made their way across Kansas and Nebraska, twice fighting the troops as well as a body of armed citizens who attacked them. They were finally intercepted by other troops, and, after some fighting, surrendered on October 3, 1878, and were taken to Fort Robinson, their former reservation in Nebraska. It was two days before the surrender, October 1, 1878, that the property of the claimant is found to have been taken or destroyed by these Indians. Up to the time they were fired upon by the pursuing troops in the Indian Territory, they had committed no atrocity, were in amity with the United States, and desired to remain so. After they were fired upon their flight was characterized by the usual excesses of Indian warfare. The leading chief was Dull Knife, who was accompanied by Old Crow and Wild Hog with some of their bands, but, regarded as a military force, they were under the command of Dull Knife. The band at the time of the surrender consisted of forty-nine men, fifty-one women and forty-eight children.

The main body of the Northern Cheyennes, to which these bands seem to have originally belonged, both in the Indian Territory and on the Northern Reservation, were in amity with the United States. Although these bands, under the leadership of Dull Knife, were evidently driven into hostility with the United States by the action of the troops in firing upon them pending a peaceful effort to induce them to return to their reservation, and thereby instituting an Indian warfare, the fact still remains that this was an independent band which had broken away from the main body of the Cheyennes, and was acting in hostility to the United States and to all the frontiersmen along their path of retreat. As stated in the opinion of the court: "They fought and fled, and scattered and reunited; they fought other military commands and citizens who had organized to oppose them, and in like manner they again and again eluded their opponents, making their way northward over innumerable hindrances. They had not sought war, but from the moment when they were fired upon they were upon the war path—men were killed, women were ravished, houses were burned, crops destroyed. The country through which they fled and fought was desolated, and they left behind them the usual well known trail of fire and blood."

While the ghastly facts of this case, which are set forth with much greater detail in the opinion of the Court of Claims, appeal strongly to the generosity of Congress to recompense those who have suffered by the incon-

siderate and hasty action of the troops in driving these Indians into hostility, they afford no ground whatever for a judgment against the tribes to which these Indians originally belonged, but from which they had separated and carried on independent operations. In fact, it would be highly unjust to add to their manifest sufferings the payment of these damages from their annuities, or from other funds standing to their credit. Nor does the claim make a case against the United States under the act vesting jurisdiction in the Court of Claims. We are not at liberty to consider the circumstances under which these Indians were driven into hostility to the United States. That the band was not in amity from the moment it was fired upon by the troops is entirely clear, That the band itself was beyond the control of the tribes to which it originally belonged is equally clear. As stated by the court below, "It was not the case of individual Indians wandering from the main body, murdering and destroying, while the main body remained in amity with the United States; but it was the case of an entire body waging armed resistance, with all its might and with all the ferocity of Indian warfare, against whatever power the United States could bring to bear upon them. The fearful extermination of Dull Knife's band by the responsible military authorities of the United States on the assumption that they were escaping prisoners of war, refutes the idea of pre-existing amity and renders it preposterous." The fact that they were treated as prisoners of war also refutes the idea that they were murderers, brigands or other common criminals.

To constitute a "band" we do not think it necessary that the Indians composing it be a separate, political entity, recognized as such, inhabitating a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings.

The opinions of the court below in both of these cases are so thorough and satisfactory that a prolongation of this opinion would be but a mere repetition of those. The law which controlled the disposition of the case just decided is equally applicable here, and the judgment of the Court of Claims dismissing the petition is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.